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# Massachusetts Law Quarterly

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ALBERT MASON, 1890-1905.

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*Presented at the Annual Dinner  
of the*

*Massachusetts Bar Association, at New Bedford, 1921.*

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Issued Quarterly by the  
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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS  
OF AUGUST 24, 1912,

Of Massachusetts Law Quarterly, published quarterly at  
Boston, Mass., for October 1, 1921.

*Publisher*, Massachusetts Bar Association, 60 State Street, Boston, Mass.

*Editor*, The Publication Committee of the Association.

*Managing Editor*, FRANK W. GRINNELL, Secretary of the Association.

*Business Managers*, Same as above.

*Owners*, Massachusetts Bar Association.

*President*, Edward W. Hutchins. *Treasurer*, Charles B. Rugg. *Secretary*, Frank W. Grinnell.

Known bondholders and other security holders, none.

FRANK W. GRINNELL.

*Sworn to and subscribed before me this 19th day of September, 1921.*

ROGER D. SWAIM,  
*Notary Public.*

*(My commission expires March 31, 1927.)*

[SEAL]

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## A BRIEF HISTORY OF THE SUPERIOR COURT.

In 1859, a joint special committee of the legislature was appointed to consider the courts. At the beginning of their report (House Document 120 of 1859), they described the then existing system as follows:

“The plan upon which our courts are now organized was established in 1820. The Commonwealth then contained but five hundred and twenty-three thousand two hundred and eighty-seven inhabitants. The theory of the courts then was, that any party was of right entitled to two trials by jury of all questions of fact in all important cases, civil, as well as criminal. The first was in the court of common pleas; either party could then appeal for another trial in the supreme judicial court. This system of trials stood till the year 1840, when Governor Morton went from the bench to the chair of the executive. In his long judicial life, he had seen the mischievous fruits of this system, in its delays and expenses. Upon his recommendation, the legislature of that year took away all right of appeal on questions of fact, and defined the jurisdiction of the two courts. Exclusive jurisdiction was given to the supreme judicial court, of all writs of entry, except to foreclose mortgages, and of all other real actions, respecting easements on real estate, except complaints for flowing lands and actions of trespass on real estate; and of actions wherein the plaintiff or some person in his behalf would make oath, that the matter sought to be recovered exceeded in amount the sum of three hundred dollars, if the action were brought in any county other than Suffolk; and six hundred dollars, if brought in Suffolk county. All other civil actions were left in the court of common pleas. It is apparent, this division of business between the two courts had no respect to the importance of the matters litigated in either, but was based entirely upon arbitrary considerations of convenience.

All questions of law, except upon dilatory pleas, by the same act, were made determinable in the supreme



judicial court. The number of justices of that court was reduced from five to four, and the office vacated by Governor Morton was abolished. Immediately upon the passage of the act, many questions arose upon the jurisdiction of the respective courts. In five several instances legislation has been had to relieve the obscurities and infirmities of this short act thus conferring jurisdiction, and to set out more clearly the matter of which the respective courts should have cognizance. Though nearly twenty years have elapsed since its enactment, the courts are yet busy in determining the powers of the various tribunals under it. And after all these acts of legislation and more than that number of decisions of the supreme court thereon, the law is now in such a state that the commissioners upon the revision of the statutes have found more difficulty, than upon any other subject, in putting these same questions of jurisdiction in an intelligible form into their report."

The legislative committee of 1859, above referred to, then made a new starting point by recommending the abolition of the Superior Court for Suffolk County and the Court of Common Pleas throughout the rest of the state and the creation of a Superior Court for the whole Commonwealth. This recommendation was followed and the present Superior Court came into existence. It was given concurrent jurisdiction in equity with the Supreme Judicial Court in 1883 and in order to relieve that court because of its constantly increasing appellate work, jurisdiction of libels for divorce and petitions for nullity of marriage was transferred to the Superior Court in 1887 and capital cases in 1891, so that for the past thirty years it has been the great trial court of the Commonwealth.

When the Court was created in 1859 it consisted of ten judges, including the Chief Justice. With the increase of work for the Court the number of judges has been increased from time to time and since 1911 there have been twenty-eight judges, including the Chief Justice.

The November number of this magazine for 1920 contained the portraits of all the justices of the Supreme Judicial Court of whom portraits were available since its creation in 1699. A similar portrait history of the great trial court of the

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Commonwealth would be interesting, but is not feasible, at present, at least. Portraits of the Chief Justices of that court, however, are here reproduced.

The following biographical information is taken from Davis' "History of the Judiciary of Massachusetts."

CHARLES ALLEN, son of Joseph, was born in Worcester, August 9, 1797. He entered Yale College in 1811 and left at the end of one year, and shortly after entered the law office of Samuel M. Burnside and was admitted to the bar in 1818. He practiced in New Braintree six years, and in 1829, returning to Worcester, became a partner with John Davis. He was a Representative in 1829-1834-1836-1840 and Senator in 1835-38-39, and in 1842 was a member of the Northeastern Boundary Commission. In 1842 he was appointed Judge of the Common Pleas Court and resigned in 1844, in which year he became a member of Congress, serving until 1853. In 1858, on the resignation of Chief Justice Nelson of the Superior Court of Suffolk County, he was appointed his successor. The Court was abolished in 1859 by the Act establishing the Superior Court for the Commonwealth, and he was appointed in that year Chief Justice of the new Court. He resigned his seat in 1867, and died in Worcester, August 6, 1869.

SETH AMES, son of Fisher Ames, was born in Dedham, Mass., April 19, 1805, and graduated at Harvard in 1825. He studied law at the Harvard Law School, in the office of George Bliss in Springfield, and in the office of Lemuel Shaw in Boston and was admitted to the Court of Common Pleas in Dedham in 1828, and to the Supreme Judicial Court in Cambridge in 1830. He began practice in Lowell, was Representative in 1832, Senator in 1841 and City Solicitor of Lowell from 1842 to 1849. In 1849 he was appointed Clerk of the Courts for Middlesex County and removed to Cambridge, and in 1859 was appointed to the bench of the Superior Court of which he was made Chief Justice in 1867. In 1869 he was appointed Judge of the Supreme Judicial Court and removed to Brookline. He resigned his seat January 15, 1881, and died in Brookline, August 15, in the same year.



LINCOLN FLAGG BRIGHAM, son of Lincoln Brigham, was born in Cambridge, October 4, 1819, and graduated at Dartmouth in 1842. He studied law at the Harvard Law School and with John H. Clifford and Harrison G. O. Colby in New Bedford and was admitted to the Bristol bar in 1845. He was for a time a partner of Mr. Clifford and was District Attorney six years. In 1859 he was appointed Associate Justice of the Superior Court and in 1869 Chief Justice, serving until he resigned in 1890. He died in Salem, February 27, 1895.

ALBERT MASON, son of Albert T. Mason, was born in Middleboro, Mass., November 7, 1836, and after studying law in Plymouth was admitted to the Plymouth bar February 15, 1860. He enlisted as a private in the 38th Regiment, was commissioned Second Lieutenant of Company F in that regiment. He served until 1865 as Second Lieutenant, First Lieutenant, Captain and Assistant Quartermaster, and then resumed practice in Plymouth. At a later date he moved to Boston and in 1874 was appointed a member of the Board of Harbor Commissioners, and in 1882 a Judge of the Superior Court, of which he was made Chief Justice in 1890.

JOHN ADAMS AIKEN was born in Greenfield, September 16, 1850, and graduated at Dartmouth in 1874. He was a Representative in 1883. In 1898 he was appointed Judge of the Superior Court. In 1905 he was appointed to the position of Chief Justice and has served in that position ever since.

In these days of uncertainty as to the future of the country it is an interesting and suggestive fact which may well cause reflection on the part of those who are inclined to pessimism, that in 1808 Fisher Ames, the brilliant orator of the early days of the Commonwealth, died obsessed with fears that the excesses of the French Revolution would appear on this side of the Atlantic, and that his children must look forward to "their future servitude to the French." (See Henry Adams' History of the United States, I., 83.) One of those children, Seth Ames, lived to be the Chief Justice of the Superior Court and later a justice of the Supreme Judicial Court in the Commonwealth which stands before the country today, as in the past, for the principles of liberty under law.

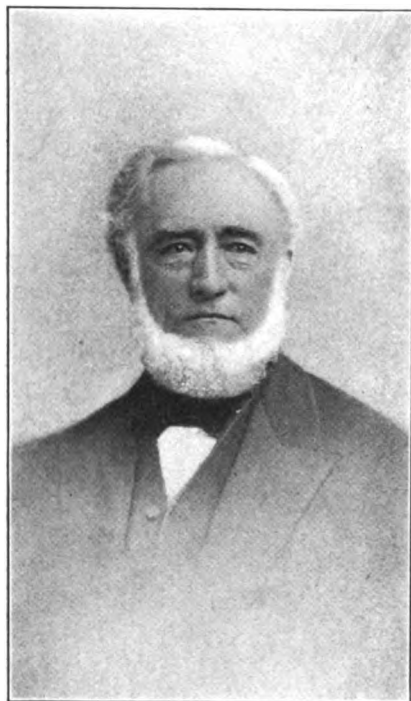
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*Charles Allen*

Chief Justice Superior Court, 1859-1867.

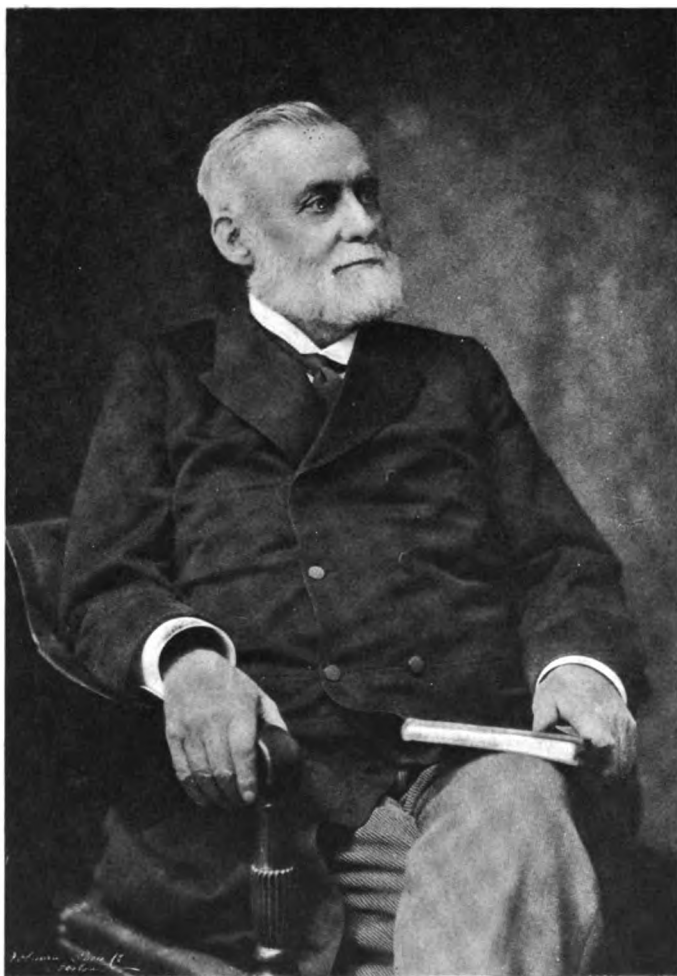




**SETH AMES.**  
Chief Justice Superior Court, 1867-1869.



LINCOLN FLAGG BRIGHAM.  
Chief Justice Superior Court, 1869-1890.



**ALBERT MASON.**  
Chief Justice Superior Court, 1890-1905.



JOHN ADAMS AIKEN.  
Chief Justice Superior Court, 1905—















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JOHN C. HAMMOND,	Northampton.	JOHN H. SCHOONMAKER,	Ware.
IRVING W. SARGENT,	Lawrence.	HENRY A. WYMAN,	Boston.

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Law Quarterly.*

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ARTHUR LORD.

GEORGE R. NUTTER.  
THE SECRETARY.

*Special Committee on Uniform Laws.*

ROBERT G. DODGE, *Chairman*.  
ROBERT P. CLAPP.

GEORGE P. DEURY.  
THE SECRETARY.

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ALFRED HEMENWAY, of Boston, 1910-1911.  
CHARLES W. CLIFFORD, of New Bedford, 1911-1912.  
JOHN C. HAMMOND, of Northampton, 1912-1913.  
MOORFIELD STOREY, of Boston, 1913-1914.  
HERBERT PARKER, of Lancaster, 1914-1915.  
HENRY N. SHELDON, of Boston, 1915-1916.  
CHARLES E. HIBBARD, of Pittsfield, 1916-1917.  
ARTHUR LORD, of Plymouth, 1917-1918.  
JOHN W. CUMMINGS, of Fall River, 1918-1919.  
FREDERICK P. FISH, of Brookline, 1919-1920.  
EDWARD W. HUTCHINS, of Boston, 1920-1921.

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FOR 1921-1922.

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*Secretary:* W. THOMAS KEMP, 901 Maryland Trust Building, Baltimore,  
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JOHN E. HANNIGAN, Barristers Hall, Boston.

REGINALD H. SMITH, 60 State St., Boston.

JAMES M. ROSENTHAL, Pittsfield.





## THE ANNUAL MEETING.

---

The annual meeting of the Massachusetts Bar Association was held at the New Bedford Hotel, New Bedford, Saturday, October 15, 1921.

The meeting was called to order by President E. W. Hutchins at 11:30 A. M.

THE PRESIDENT.—We first proceed to the report of the Membership Committee and the election of new members, in order to give applicants a chance if they wish to vote at this meeting, providing they be present.

The following applicants for membership were recommended by the Membership Committee and a ballot being taken were declared elected.

Mrs. Rose Kingsley, 1572 Mass. Ave., Cambridge.  
Mrs. Mary A. Costello, 40 Court St., Boston.  
Mrs. Sadie Lipner Shulman, 101 Tremont St., Boston.  
Miss Helen West Bradley, 55 Congress St., Boston.  
Mrs. Pauline Nelson Hartstone, 40 Court St., Boston.  
Mrs. Emma Fall Schofield, Malden.  
Lawrence E. Green, 60 State St., Boston.  
Howard N. Brown, 70 State St., Boston.  
Andrew Marshall, Sears Bldg., Boston.  
Horace E. Allen, 3rd National Bank Bldg., Springfield.  
John V. Carchia, 120 Langdon Ave., Watertown.  
Edward Hutchins, Sears Bldg., Boston.  
Arthur W. Blakemore, 40 Central St., Boston.  
Oliver Mitchell, 99 State St., Boston.  
Robert E. Goodwin, 84 State St., Boston.  
Samuel Hoar, 84 State St., Boston.  
George K. Gardner, 84 State St., Boston.  
Edward C. Thayer, 84 State St., Boston.  
Leverett Saltonstall, 55 Congress St., Boston.  
Wilmot R. Evans, Jr., 15 Beacon St., Boston.  
Odin Roberts, 209 Washington St., Boston.

Benjamin B. Barney, 11 Masonic Bldg., New Bedford.  
Joseph T. Kenney, Merchants Bank Bldg., New Bedford.

Samuel Barnet, 774 Purchase St., New Bedford.

Philip Barnet, 774 Purchase St., New Bedford.

Justus A. Briggs, Jr., 18 Masonic Bldg., New Bedford.

Edward J. Harrington, 2 Masonic Bldg., New Bedford.

George H. Potter, Bookstore Bldg., New Bedford.

Merton C. Fisher, 37 Masonic Bldg., New Bedford.

Isaiah C. Dade, Five Cents Sav. Bank Bldg., New Bedford.

Charles N. Serpa, 16 Masonic Bldg., New Bedford.

Gerrett Geils, Jr., 34 Masonic Bldg., New Bedford.

Thomas A. Cunniff, 1208 Acushnet Ave., New Bedford.

Patrick M. Doyle, 307 Bookstore Bldg., New Bedford.

William R. Freitas, 194 Union St., New Bedford.

John M. Bullard, 5 Masonic Bldg., New Bedford.

Eliot N. Jones, 50 State St., Boston.

Harris H. Gilman, 84 State St., Boston.

Jacob J. Kaplan, 161 Devonshire St., Boston.

Alfred L. Fish, 161 Devonshire St., Boston.

The Secretary read the report of the Executive Committee.

#### REPORT OF THE EXECUTIVE COMMITTEE.

A detailed report of the action of this Committee, at its meeting on February 8, 1921, relating to the report of the Attorney General, and its support of the proposal for a declaratory act recognizing the right and duty of the Attorney General to appear before the Grand Jury and any other tribunal on behalf of the Commonwealth whenever in his judgment the public interest required; and its opposition before the Legislature to the proposed bill to prevent his appearance before the Grand Jury without the request of the local District Attorney, was submitted in their February Quarterly for 1921 (Vol. VI, No. 3, p. 43). As pointed out in the note on page 107 of the May number of the Quarterly, the opinion of Chief Justice Rugg in *Commonwealth v. Kozlowsky*, handed down in May, establishes the position of the Attorney General in such a way that a declaratory act seems now unnecessary.

At the meeting on February 8th, the office of the United States Attorney was discussed and the votes were passed which are quoted in the following letter:

FEBRUARY 12, 1921.

HON. HENRY CABOT LODGE,  
United States Senate,  
Washington, D. C.

DEAR SIR:

At a meeting of the Executive Committee of the Massachusetts Bar Association on Tuesday, February 8, 1921, the following vote was passed:

“VOTED that in view of the importance of the selection at this time of a man well fitted for the office of United States Attorney for the District of Massachusetts, the Executive Committee of the Massachusetts Bar Association will be glad to co-operate, and respectfully requests an opportunity to present their views to Senator Lodge before the choice is made.”

It was further

“VOTED that the secretary send a copy of the foregoing vote to Senator Lodge accompanied by a letter of inquiry as to how in his judgment the committee may best co-operate with him in the matter.”

If the committee of this association can be of assistance in this matter and you will indicate to me how, in your opinion, such assistance may best be rendered, I will bring the matter promptly before the president of the association for appropriate action.

Yours respectfully,

F. W. GRINNELL,  
*Secretary.*

The secretary having received a reply from Senator Lodge stating that he would be very glad to know their opinion, another meeting was called for February 23d, and the following letter was sent:

FEBRUARY 23, 1921.

HON. HENRY CABOT LODGE,  
United States Senate,  
Washington, D. C.

DEAR SIR:

A meeting of the Executive Committee of the Massachusetts Bar Association having been called for February 23, 1921, at 2.30 P. M., to consider what, if any, action should be taken in regard to the office of United States Attorney for the District of Massachusetts, the unanimous opinion of those present at the meeting was in support of Hon. Robert O. Harris for the position, and I was requested to communicate this opinion to you.

Yours respectfully,

F. W. GRINNELL,  
*Secretary.*

A joint meeting of the Executive Committee and the Committee on Legislation was called for May 16, 1921, to consider the recommendation of the Judicature Commission for a Judicial Council then pending before the Judiciary Committee of the Legislature. After discussion, the following signed vote was sent to the Chairman of the Judiciary Committee:

At a joint meeting of the Executive Committee and Committee on Legislation of the Massachusetts Bar Association on May 16, 1921, the undersigned members being present, it was

VOTED: That it was the sense of the meeting that the bill for a judicial council as recommended in the Report of the Judicature Commission on pages 135-6 be supported.

(Signed) JAMES A. LOWELL, STOUGHTON BELL,  
HENRY M. HUTCHINGS, ROBERT WALCOTT,  
CHARLES MITCHELL, JEREMIAH SMITH, JR.,  
JOHN F. CRONAN, EDMOND JOHN FORD,  
F. W. GRINNELL.

A copy of the above was sent also to each member of both committees who was unable to be present, and communica-

tions were subsequently received from Messrs. Edward W. Hutchins of Boston, Richard P. Coughlin of Taunton, John Barker and James M. Rosenthal of Pittsfield, and E. K. Arnold of Boston, in support of the vote.

The next meeting of the Committee was held on July 12, 1921, to consider the time and plans for the annual meeting. It was voted to hold the meeting at New Bedford, and the President and Secretary and Mr. Mitchell, of New Bedford, were appointed a committee to arrange for the meeting.

Hitherto it has been the custom to serve the annual dinner at the expense of the Association without charge to members. This has amounted to a large annual bill to the Association, not only for the dinners that were eaten and enjoyed, but for those which had to be guaranteed because members sent word that they were coming and then were wasted because men gave out without notice. The annual wasting of the funds of the Association by this process has averaged perhaps about \$100, making a total, probably, of about \$1000, since the Association was organized, which might have been used for other purposes. With dues of only \$5 and the cost of printing, paper, and everything else going up, the funds of the Association could not stand this drain indefinitely, and accordingly, the Committee believed that if the professional work of the Association was to be continued as it should be, the practice of providing an annual free dinner must be given up and the usual practice of other similar organizations adopted of charging for the dinner.

A list of new members was printed in the February number of the magazine at page 26. Since then the following new members approved by the Committee on Membership have been elected by the Executive Committee:

Emerson W. Baker, 327 Main St., Fitchburg.  
Charles P. Curtis, Jr., 30 State St., Boston.  
Leon C. Guptill, 704 Tremont Bldg., Boston.  
William G. Rowe, Brockton.  
John D. Wright, Brookline.

Respectfully submitted,

F. W. GRINNELL,  
*Secretary.*



MR. ROSENTHAL of Pittsfield.—Mr. President, there is just one point I would like to bring up, because it is a matter of a policy. That is the matter in connection with the nomination or suggestions for the nomination of the United States Attorney. Now, along with every one else I consider the nomination of Judge Harris admirable, but I doubt very much the propriety of the Massachusetts Bar Association suggesting names for any office which is regarded not as strictly judicial in its nature but which is regarded as a political office which changes with the administration. I think we exceed our function when we make recommendations in that regard, and in the future I hope for my own part that it will not be done.

THE PRESIDENT.—Do you wish to make any motion?

MR. ROSENTHAL.—No, I don't wish to make any motion. I just bring it up for a matter of discussion. It seemed to me as I read it in the newspapers at the time that it was improper for the Association and for any of its committees acting in the name of the Association to make suggestions for offices which are regarded by the community at large as political in their nature.

THE PRESIDENT.—Would you like to have the vote put on that before the vote is taken on the acceptance of the report?

MR. ROSENTHAL.—That makes no difference to me.

The report was accepted.

THE PRESIDENT.—Will you bring up your motion later for a discussion of the subject mentioned?

MR. ROSENTHAL.—If the President considers it worth while.

THE PRESIDENT.—Well, the Bar Associations are all of them having difficulty with a similar question, namely, whether they shall go to the Governor with suggestions or wait until the Governor comes to them and asks them—whether they shall say in the first place to the Governor, "We are ready to help you if you want us to, but we do not propose to volunteer." That is a very interesting question and I should think your question might well be discussed with it.

The Treasurer, Mr. Rugg, presented his annual report, which is abstracted as follows:

## ABSTRACT OF TREASURER'S REPORT.

Balance as of December 1, 1920 . . . . .	\$747.81
Savings Department Merchants National Bank . . .	2,022.50
Received from Annual Dues, interest on deposits, etc.,	4,088.77
Interest on Savings Deposit . . . . .	92.55
General Expenses of the Association . . . . .	\$3,901.16
Balance October 14, 1921 . . . . .	934.92
Savings Department as above . . . . .	2,115.05
	<hr/>
	\$6,951.13    \$6,951.13

CHARLES B. RUGG,  
*Treasurer.*

MR. RUGG.—The payments are rather a long list, which I will not read through. The principal items are the dinner last year at the Boston City Club, \$631; the December Quarterly, which cost \$1180, and the other Quarterlies have been \$300 and \$400. The total expenditures have been \$3900. The balance on hand, \$934.92 in the checking account and \$2115.05 in the savings account.

The report was accepted subject to audit and placed on file.\*

MR. FORBUSH.—Perhaps I may preface my report by saying that the Grievance Committee of the Massachusetts Bar Association is not in the limelight at present. The Bar Association of the City of Boston handles all grievances for Suffolk County, the Bar Association of the County of Middlesex handles all grievances for that county, and so far we have been untouched by the prevailing wave of investigation.

Mr. Forbush then read the report as follows:

## REPORT OF COMMITTEE ON GRIEVANCES.

The Committee on Grievances has held two meetings during the past year, at each of which a majority of the members were present. Six complaints have been considered at these meetings. Three of these have been dismissed, after full investigation.

In one more case the original oral statement of the complainant indicated a substantial grievance. He was requested to call upon the Secretary of the committee, give his full story, and make out a formal written complaint, but failed to

\* Subsequently the Auditing Committee, Messrs. Forbush and Grinnell, reported the account correct.

do so. The matter was then referred to a member of the local bar of the city where the attorney complained of was in practice. Repeated efforts on the part of the local attorney to get in touch with the complainant utterly failed; and the committee was thus obliged to drop the matter from further consideration for the present at least.

It was voted at the last meeting to dismiss one other complaint unless further evidence is submitted to the committee by the complainant before the next meeting.

The only other matter now undisposed of, involves some unusual questions as to jurisdiction and procedure which are now under investigation, as a necessary preliminary to any formal action.

We are glad to state that most of the complaints brought to our attention are frivolous or unfounded; and in many cases are the result of lack of tact on the part of the attorneys or their failure to sufficiently explain to ignorant clients the full details of the matters involved or the necessary delays of legal process. Such matters are usually disposed of by the faithful and efficient Secretary.

The committee has fully considered and discussed the matter referred to it at the last annual meeting, viz:—the difficulties arising out of the concurrent jurisdiction of the grievance committees of the various county associations and of the state association.

As a part of such consideration, inquiries have been made of various prominent members of local bar associations as to their views on this question; and a great conflict of opinion appears.

It appears to this committee that any action by this association at the present time would not be helpful, and that the whole question will be likely to work itself out naturally in due time. The committee, therefore, recommends that no action be taken by the association.

Respectfully submitted,

FRANK M. FORBUSH,

*Chairman.*

The report was accepted and ordered placed on file.

## REPORT OF COMMITTEE ON JUDICIAL APPOINTMENTS.

### *To Massachusetts Bar Association:*

The Committee on Judicial Appointments faces the dilemma on the one hand that it is hardly desirable or feasible to take formal action as to who should be suggested as appropriate appointments to the Bench when there is no vacancy, and on the other, the appointments in recent years have followed the occurrence of the vacancy so soon as to leave the Committee little time for deliberation.

The Committee met as soon as might be after the resignation of Mr. Justice White. The Committee was urged to consider the importance of having a Justice of the Superior Court resident in Berkshire County. They also considered several names of those believed to be fitted for appointment to the Superior Court from various parts of the State. Before making any recommendation it seemed to the Committee desirable to ascertain whether this would be of assistance to the Governor. Accordingly, the Chairman was requested to communicate with the Governor with a view to establishing relations between himself and the Bar Association of the Commonwealth which would give the Governor the benefit of such assistance as the Committee might be able to give him in the matter of judicial appointments.

The Governor welcomed this effort, and expressed his desire to have the assistance which this Association can give in laying before him their knowledge, gained from professional contacts with lawyers under consideration for such appointments.

Mr. Justice Burns of Pittsfield was nominated by the Governor on the following day.

On the resignation of Mr. Justice Shaw the Committee did not find it feasible to meet before the nomination of Mr. Justice Qua.

The Committee as such cannot properly take to itself the credit for the excellence of these two appointments.

No other appointments have been made to the Supreme Judicial Court or to the Superior Court or to the Federal

Courts for this District since the constitution of this Committee.

Respectfully submitted,  
For the Committee,  
EDWARD F. McCLENNEN,  
*Chairman.*

OCTOBER 15, 1921.

The report was accepted.

The report of the Nominating Committee was read and a ballot being taken, the persons named in the list printed at the beginning of this number, were elected.

### REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

Your committee has no extended or formal report to make at this time concerning legal education in this Commonwealth, and no occasion for the action of this committee has been called to its attention.

It will not be amiss, however, to state that in 1920 the American Bar Association, acting through its Section on Legal Education, instructed the chairman of that section, Elihu Root, to appoint a special committee who should report in 1921

“its recommendations in respect to what, if any, action shall be taken by this Section and by the American Bar Association to create conditions which will tend to strengthen the character and improve the efficiency of persons to be admitted to the practice of law.”

(Report of 1920, page 466.)

Pursuant to these instructions a special committee was appointed. This committee sent a “questionnaire” to examiners for the Bar and to various committees and to others throughout the United States. The answers of the persons questioned were collated by the special committee, and the results reported to the Section on Legal Education and by it reported together with certain resolutions to the American Bar Association at its annual meeting in September,

1921. Mr. Root presented the resolutions,—and moved the adoption of them. They were as follows:

RESOLVED,

(1) The American Bar Association is of the opinion that every candidate for admission to the bar shall give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publication available, so far as possible, to intending law students.

(4) The President of the Association and the Council on Legal Education and Admissions to the Bar are directed to co-operate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the bar.

(5) The Council on Legal Education and Admissions to the Bar is directed to call a conference on legal educa-

tion in the name of the American Bar Association, to which the state and local associations shall be invited to send delegates, for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth.

A vigorous discussion of the resolutions followed. A summary of the debate appears in the September number of the *American Bar Association Journal*. At the close of the debate the resolutions were adopted.

SAMUEL C. BENNETT,  
*Chairman.*

OCTOBER 15, 1921.

The report was accepted.

THE SECRETARY.—I move, Mr. Chairman, that the meeting proceed to discuss any other business which may be brought up before taking up the discussion of the Judicature report and the report on legislation which is devoted largely to that subject. I don't know whether there are any other subjects to be brought up or not.

THE PRESIDENT.—Are there any other subjects to be brought up for discussion other than the report of the Judicature Commission? [No response.] Does any one desire to bring any matter to the attention of the Association?

THE SECRETARY.—I move, then, Mr. Chairman, that we proceed to the discussion of the subject, and perhaps the best introduction to it is the report of the Committee on Legislation, which takes up the various recommendations separately. The report is printed in the August number of the Quarterly.

The motion was carried.

THE PRESIDENT.—I want to tell a story before we proceed to the discussion, because I am interested in having this discussion full and having everybody say something on the subject. It is a story of Sam Elder's. It concerns a funeral in the middle of New York State. It was the fashion for the friends and relatives of the deceased to gather in the living room, or rather the room which was rarely lived in in the house; the neighboring families got together and the clergyman read a hymn or two and said a prayer or two and then

said what he could about the deceased; any characteristics of his that ought to be praised he praised. But this was an old curmudgeon whom nobody liked and the minister could but say a few words, and then he stopped as was the custom there and waited for the friends and relatives to get up and supplement what he had said. It was usually done by those who were there. This time no one moved, no one got up, no one said a word. The pause grew painful. At last one old farmer in a smock frock in the rear of the room got up and said, "If no one wants to say anything about this 'ere deceased I'd like to say a few words about the tariff." The discussion is in order now, gentlemen.

THE SECRETARY.—I would suggest that it would be a good plan to take up some of these subjects separately. There are twenty-six recommendations of the report of the Judicature Commission. I don't know that we can discuss them all at this meeting and it would be a good plan to take up separate subjects. One of the first subjects which is dealt with in that report is that for the creation of a Judicial Council. That recommendation was one of those which was approved by the Judiciary Committee of the Legislature. It was reported favorably by that committee by a divided vote of 8 to 7.

The subject, as already pointed out in the report of the Executive Committee, was discussed by the Executive Committee and the vote there mentioned was sent to the Judiciary Committee in support of the bill as recommended by the Commission. With the sole exception of the matter of reporting to the Governor instead of to the Legislature, the bill reported by the Judiciary Committee differs from that proposed by the Commission only in certain details as to the power to summon witnesses and the method of selecting members of the Bar and one or two other matters which the Commissioners do not seem to consider essential. The matter was referred by the House to the Ways and Means Committee and was rejected by that Committee, so that it is not now before the Legislature. At the next annual session I presume the matter may receive still further consideration if it is brought again before the Legislature, and as that is one of the most important recommendations of the Judicature Commission I think that is the best subject to take up first in this discussion. The Committee on Legislation has recommended that



the recommendation of the Commission be supported before the next legislative session.

MR. ROSENTHAL.—Mr. President, I might be interested to learn what are the objections that the Legislature made to this bill.

THE SECRETARY.—One suggestion which I heard at the time this matter was about to be heard before the Ways and Means Committee, and which I mention for the purpose of disposing of it, is that there was apparently a rumor at the State House that the Commission had spent a hundred thousand dollars. I have since heard the rumor reduced to \$60,000, but even that sum seems a trifle exaggerated in view of the fact that the Legislature never appropriated more than \$5,000, and that was not quite all spent. I presume the objections, so far as I have heard them expressed, were the fact that there might be some expense involved; the suggestion that it was an attempt to set up a little group to run the courts, or another commission, and the comparison of it to the Boston Finance Commission. Those are the only objections, so far as I have heard them expressed. There was not a very extended discussion before the Ways and Means Committee. There were two or three members of the Judiciary Committee who appeared in opposition and the general line of it, as I remember, was that this was unnecessary and that this commission would spend money and it was an attempt to run the judges, and other objections of that kind.

MR. JAMES E. McCONNELL of Boston.—Mr. Chairman, I move that it be voted that the Executive Committee support this same bill before the incoming Legislature—introduce it and support it.

The motion was seconded by Mr. Lowell.

THE PRESIDENT.—In the form approved by the Commissioners, with the report to be to the Governor rather than to the Legislature?

MR. McCONNELL.—Yes.

THE PRESIDENT.—It is moved and seconded that the Executive Committee be instructed to introduce a bill and to support it after it has been introduced, the bill to be in favor of the appointment of a commission as stated in the report, and to involve the report to the Governor, as I understand it, instead of to the Legislature.

The motion was carried, no one voting in opposition.

THE SECRETARY.—In view of the number of things that are dealt with in both reports it seems to me it would be well to take up the more important subjects rather than to follow any particular order. Next to the Judicial Council I suppose the general subject of procedure in criminal matters is the most important subject dealt with in the report. There are various recommendations in regard to that matter.

The Commission recommended, after describing the present congestion of business in the Superior Court, resulting from appeals in criminal cases and other conditions—they suggested a plan of having more jury sittings of the Superior Court, presided over by judges of the District Court in different localities, for the purpose of disposing of the criminal appeals. That plan had the advantage of not creating any additional courts, using existing judges. They also recommended the experiment in the Boston Municipal Court of having an election as to jury trial before a case was tried below, and if a man wanted a jury trial, send him directly to the Superior Court, and if he did not then claim a jury he should stand his trial and sentence in the lower court with an appeal only on sentence or law. Those recommendations perhaps might be discussed by members of the Commission themselves, two of whom are here. Mr. Green, I think might enlighten you more fully than I can on that subject.

MR. ADDISON L. GREEN of Holyoke.—The whole question of the trial of criminal cases in Massachusetts is a very serious one. How serious it was I never realized until the Commission began its work. There is opportunity to try but the merest fraction of the cases pending in this Commonwealth. District attorneys are at an absolute disadvantage in the handling of their business. They are obliged to bargain away a large amount of the business that comes before them, from mere lack of opportunity to try. That is not the complaint of the district attorneys alone; that is the agreed statement of the situation from the lips of the judges who have been holding the Superior Court. That ought not to be. A cunning criminal ought not to be in a position to drive the Commonwealth into a bargain with him.

Now, granted that the situation is that, we have not superior court judges enough to preside at courts enough for a long

enough period of time to try but a fraction of our cases, what are we going to do? One answer would be to have more superior court judges. There are objections to that. The Commission did not think it wise, after studying the matter carefully, to recommend any more superior court judges. Many suggestions were made to us. The essence of this suggestion came from a very practical judge of the Superior Court. It came from him not exactly in the form in which we made it, but the essence of it was there. He said in substance, "We have the court houses, we have the court officers, we have the district attorneys, we can get the juries; we have all the paraphernalia for trying these cases except judges. Why not create a separate court to try criminal appealed cases?" He had himself been a district attorney and a good one, and he himself recognized the disadvantages that district attorneys are under, the inability to try cases. The idea of having a separate court did not appeal to me and did not appeal to the Commission. His idea was to use the District and Police Court judges in this new court, but it does not seem to be necessary to create a new court in order to use these judges. Why not use them in trying, say, appealed cases in the Superior Court? Take them by and large through the State, they are a good body of men. They are entirely capable of dealing with such appealed criminal cases. Most of them have time to spare. I do not say that disparagingly. There are some centers like Springfield, Boston, Worcester, probably New Bedford and Fall River—I don't know—there are some centers where the judges are not only busy but overworked, but there are any number of the district courts where they have comparatively little to do. An hour or two a day of business takes care of it. Now if we could draft such judges all criminal cases could be tried. It would not be possible then for any astute lawyer in defense of his client who knew the condition of the docket, to say to the district attorney, "I demand a trial," when the last thing on earth he wants is a trial, but he demands it because he knows the district attorney cannot try his client. Every man can then have his day in court. A district attorney can try his cases, and I have a very strong guess as a lawyer of some years' trial experience myself, that when it is found out that every fellow can have his day to be tried there will be fewer

demands for trial than there are now. This was our suggestion as a way out of this difficulty. It calls for no creation of new courts; it calls for the use merely of machinery we have at present. It entails but a moderate amount of extra expense on the Commonwealth and it seems to me it would help to do away with a most intolerable evil. Whatever the expense or however we do it, it cannot be that criminals shall be able in Massachusetts, to bargain with our courts upon the question of what is to be done with them.

THE PRESIDENT.—Am I wrong in supposing as the result of having read pretty carefully the report of the Commission and still more carefully the report of the Committee, that there are very few differences between them?

THE SECRETARY.—That is true to considerable extent. The recommendations are taken up separately and are reported on in most cases by the committee. I should perhaps suggest, Mr. President, that in many ways the discussion, at a meeting of this kind of these subjects in order to get the subjects aired, is of more importance than any particular action of the meeting. I think what we want to do is to get practical suggestions and practical reactions of men on these suggestions, of the Commission, whether we take any action on behalf of the Association or not. Of course, although there are fifty or sixty practicing lawyers here, it is a comparatively small body of the members of the Association. It is the only opportunity we have, however, to have oral discussion of these subjects by members of the Association. We may get some very practical suggestions either in criticism or improvement on a particular matter, or some entirely new suggestion. Therefore I think that it is perhaps advisable to take up these subjects one after another for discussion without any formal action of the Association unless such action is suggested and the meeting wishes to take such action, in view of the fact that the time for discussion of different subjects is somewhat limited.

MR. MICHAEL A. SULLIVAN of Lawrence.—Mr. President, I have one or two suggestions which perhaps are rather interrogatories than suggestions. In the first place, I would like to ask if the bill as proposed contemplates the associate justices of the district courts as well as the regular justices hearing these cases in the Superior Court. In the second

place, whether the justices of the district courts are to preside in sittings of the Superior Courts outside of their jurisdiction. It occurs to me that the places where the congestion of cases in the Superior Court exists are likely to be the very same places where justices of the district courts have all their time taken with their present duties.

There is another thing which perhaps does not go to the root of the matter but which might be alleviative. In observing the proceedings at the current term of the Superior Court in Essex I found that the time is largely being taken up with liquor cases, while serious felonies are not disposed of. Now more than ever there are liquor cases of trivial importance which are being brought to the attention of the courts, cases, too, which in some phases are being heard also in the Federal Court. A large number of cases of illegal keeping, for instance, are brought on appeal to the Superior Court where there is not much likelihood of conviction. Most of these cases have to be tried because the statute law prescribes that they shall have priority over all except jail cases, and because the district attorney cannot dispose of them without the consent of the court. It seems to me it would help, and it would be highly desirable, if the present statutory requirement for the prior disposition of liquor cases were done away with.

Something might also be said about the recent statutory requirement regarding non-support cases. This, however, is not so important with reference to the discussion of the congestion of the courts, because there are not so many of those cases.

These remarks are made by me not as a result of any settled conviction that this action ought to be taken, but the questions have existed in my mind for some time and the suggestion of them may be of value to those who are considering these matters.

MR. GREEN.—Mr. President, no bill was introduced by the Commission in support of this recommendation. Probably the Commission had nothing over which it struggled harder than it did about this particular problem, and it was only at the end that a solution along these lines crystallized. It was too late to draft a bill and we, therefore, made a general recommendation that the justices of the district courts should

sit in these jury cases. It did not lie in our minds that the special justices would be called upon.

MR. SULLIVAN.—And whether they would sit outside the original jurisdiction or not?

MR. GREEN.—My own notion was that they would sit anywhere they were called upon to sit.

MR. WILLIAM R. SEARS of Boston.—There are one or two things I would like to ask of the commissioners or some one here who may know, and that is, in the counties where I presume the congestion is the greatest, such as Suffolk, Middlesex, Worcester and Essex, whether there are existing facilities in the way of court rooms and court officers so that other jury sessions could be held. And I would like also to know in a general way what proportion of the cases are appealed cases and cases of rather minor importance such as liquor cases or automobile cases or things of that kind, compared with indictments by the grand jury?

MR. CHARLES B. RUGG.—In Worcester County there are about four appealed cases to one indictment.

MR. W. H. WHITING.—There are plenty of court accommodations in Worcester and it might be interesting to know that just now there has been an increase of cases pending in the superior criminal docket of 25 per cent during the past year.

THE PRESIDENT.—Are there any further suggestions on this or any other subject in the report?

MR. ROBERT WALCOTT of Cambridge.—I hazard this suggestion with great diffidence because my experience is much less than that of many gentlemen present. It seems to me this recommendation is very likely the best thing that can be done in the immediate future, but it is only a palliative, after all, and there will have to be more radical treatment of criminal cases adopted sooner or later in Massachusetts. I should like to ask the gentlemen of the Commission whether it was considered, for one thing, to abandon the grand jury altogether in Massachusetts, as has been done in other states? I know a great many members of the Bar of considerable experience who think it does not justify its existence any longer because it often no longer registers an independent judgment, but usually reflects the wishes of the district attorney and that an information would be a sufficient beginning

of a criminal proceeding which has been held "due process" in case of *Hurtado v. California* appealed to the United States Supreme Court.\* This release from his onerous duties with the Grand Jury would give the District Attorney more time for the jury trial of supposed criminals in the Superior Court.

Then if the recommendations of the Judicature Commission are adopted, namely, that a person accused of crime shall elect before trial whether or not he wishes a jury, according to the Maryland plan, undoubtedly that will greatly lessen the appeals which now choke the dockets of our criminal jury terms. In the beginning, before a man has had a judgment against him or a sentence imposed by the court, he is not so anxious to try before another tribunal as he may become afterwards in the uncertain hope of a different finding or of a lesser sentence and the certain expectation of further delay. I think the experience with civil cases in the Boston Municipal Court has convinced most of us of that.

Further, if the district attorneys, instead of doing as one or two of them have been doing, saying to the prisoner's counsel, "Of course, you understand, Mr. So and So, that I would like to try this case, but you know as well as I do that our criminal sittings are so limited that we can try only a fraction of our cases:—Under what conditions will you have your client change his plea to "Guilty?" were able to say that certain classes of offenders would be called up promptly and stiff sentences asked for, I think it would enormously limit the appeals.

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\* NOTE.—The Supreme Court of the United States held in 1884 in the case of *Hurtado v. California*, 110 U.S. 516, 528, that Article I, Section 8, of the Constitution of the State of California, adopted in 1879, did not violate the guarantee of "due Process of law" in the Federal Constitution. The California provision provided:

"Offences heretofore required to be prosecuted by indictment shall be presented by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law."

This opinion was affirmed in 1908. *Twining v. State of New Jersey*, in which the following occurs in the opinion of Mr. Justice Moody:

"First: What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . .

"A process of law," says Mr. Justice Matthews, "which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country." *Hurtado v. California*, 110 U.S. 516, 528, 1884."

Not only in California, but in many other states, prosecution for any offence, whether felony or misdemeanor, may be begun by information, i.e., Colorado, Missouri, Nebraska, Oregon, South Dakota, Washington, Wisconsin and Wyoming and in Indiana also an information is a sufficient beginning for any offence except treason or murder.

Should he take a certain class of cases,—say breaking and entering in the night-time, or assaults with dangerous weapons, and put those cases quickly through, and men charged with those crimes would very soon realize that it was no use to appeal and attempt to trade with the district attorney because of the congestion of the court docket. It seems to me that such treatment would be more fundamental than the proposal to have judges of the district courts sit with juries for the trial of criminal cases in the hope of a more prompt disposition of criminal cases.

MR. ARTHUR D. HILL of Boston.—May I say one word on the suggestion made by Judge Walcott, looking to the abolition of the grand jury. That is a matter, of course, on which different people's judgment will differ. The grand jury undoubtedly wastes a good deal of the district attorney's time and undoubtedly it has the defects which everybody made up of people drawn from the community at large without regard to their training and knowledge, with respect to the subject with which they have to deal, is bound to have. Undoubtedly a very wise district attorney with a highly competent staff ought theoretically to be able to do the business better without a grand jury than with one. Nevertheless, on the whole, I believe the grand jury justifies its existence, and this on two grounds. First, because it brings into the administration of the law the co-operation of the general community, which is one of the most important things in the administration of justice. The community will always have more confidence in a system of criminal law which has in it a certain popular element than it will in one which is purely official. In the second place, it is a valuable protection to the district attorney and his staff against acquiring too purely an official point of view. It is a good thing to open the windows of your office once in a while and let the air blow in from the outside, and I think any district attorney who wants to can learn a great deal from his work with the grand jury. He can, so to speak, feel the pulse of the community in which he is working and whose sense of justice and sense of the relative seriousness of offences he ought to pay considerable attention to, from his relations with the grand jury. I know that so far as my own personal experience went during the year in which I served as district attorney in Boston, I felt that I got a great deal of benefit



from the grand jury which I worked with during the bulk of my term. I don't know whether they were an unusually good body or not; they certainly were a very sensible, level-headed set, from whom I got far more help than I did hindrance. Of course we did not always agree, but almost always we did in the end. Once or twice, when I disagreed with them, I found that they were right and I was wrong. I remember very well one case where they insisted on indicting a man where I thought the evidence did not warrant it, and they were greatly pleased when at the next meeting that we had I was able to say that the defendant had come in and pleaded guilty the day after the indictment. I should be very sorry personally to see the grand jury abolished. I would much rather see extra care given to the selection of grand jurors, because it is a very responsible office and might well, I think, be chosen with a very high degree of care to get good men and men who would represent the community as a whole. But I should see its abolition with very great regret.

THE PRESIDENT.—Does anyone wish to say anything further on the question of supporting that recommendation?

MR. WALCOTT.—If you please, Mr. President, in the Constitutional Convention the question of the abolition of the Grand Jury was considered in connection with an amendment proposed to the Massachusetts Constitution by Mr. William A. Burns, since appointed Justice of the Superior Court, to amend Article XII. of our Bill of Rights, so that the phrase "law of the land" should be freed from the restrictive interpretation given to it in 1857 by the opinion of Chief Justice Shaw in the case of *Jones v. Robbins*, reported in 8 Gray, 329, which was disapproved by Judge Matthews of the United States Supreme Court in the *Hurtado* case in 1884.\*

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\* NOTE.—The *Jones v. Robbins* case held "that giving the single magistrate power to pass upon an offence without presentment by a grand jury violates the twelfth article of the Bill of Rights, because the 'law of the land' was the phrase used in Magna Charta and 'It must, therefore, have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights' quoting Lord Coke, and stating that the indictment was the only method, in his opinion, for the beginning of prosecutions for felony at the time of the settlement of this country and at the date of its independence.

As was said in the debate in the Constitutional Convention,—“notwithstanding that the United States Supreme Court has not adopted the view of the Supreme Judicial Court of our Commonwealth, the only case in which this question, so far as I can find, has come squarely before the court, was Charles Nolan's case, reported in 122 Mass. 330, in 1877, and the Massachusetts Supreme Judicial Court, in the only case subsequently on

I should like through you to ask Mr. Hill if he has ever heard of any community that has abandoned the Grand Jury in favor of initiating criminal proceedings by information of the District Attorney or other public prosecuting officers and has afterwards shown any desire to get it back again.

MR. HILL.—Mr. Walcott, I know nothing about it. I only spoke to give what evidence I could from personal experience, for whatever weight that might be entitled to. I know nothing about the results in other states and cannot give you any information.

The meeting then adjourned until 3:30 P. M.

### THE LUNCHEON GIVEN BY THE NEW BEDFORD BAR ASSOCIATION.

The members met for luncheon at the Whalemens' Museum of the Old Dartmouth Historical Society at 1:30 P. M. Hon. Frank A. Milliken, President of the New Bedford Bar Association, called the meeting to order and gave an address of welcome:

#### *Ladies and Gentlemen of the State Bar Association:*

In behalf of the New Bedford Bar Association I welcome you to our city; a city of 130,000 people, 200 miles of streets for your automobiles—most of them excellent;—a city known the world over as the Whaling City because its whalers fretted the waters of every ocean. Its principal business was the whaling industry. Now its principal industry is the manufacture of fine cotton fabrics, yarns and cottons. Our mills make more than a mile a minute of the finest fabrics, and it stands the first in the world as a manufacturer of fine cotton fabrics. We are proud of our city and we have several things in the city to which I want to call your attention to prolong your stay with us, because our latchstring is out to all of you. First is the Old Colonial Courthouse on County Street, not a modern building, but all our judges unite in saying that it has one of the finest courtrooms in which to try a case in all the

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the point, affirmed the majority opinion in the Jones case. So that so far as now appears, this narrower doctrine of what constitutes or can be included in the law of the land is still law in Massachusetts and there seems to be no reason to suppose that if the case came again before the Supreme Judicial Court of Massachusetts the court would reverse the decision in the Jones case approved in the Nolan case, notwithstanding that the equivalent phrase has been otherwise interpreted by the United States Supreme Court, by several Federal courts and by a number of State courts."

The proposed amendment to the State Constitution was rejected by the Convention.

Commonwealth. The eloquence of Daniel Webster has been heard there, as well as of other very eminent lawyers at the Bar.

I would call your attention also to the fact that we have a model district courthouse with as fine appointments and accommodations as any in the Commonwealth. Those two buildings are worthy of your visit. The Registry of Deeds may appeal to some of you, and then our Free Public Library, one of the first free public libraries in the United States. I believe it is the second, the first one being in Peterboro, New Hampshire. Boston claims the honor of being the first, but really it is the third. A visit to our Free Public Library will be an eye-opener to a great many of you, and I hope before your sojourn is ended you will be able to visit it. It is the stone building which you passed when you made the turn to come down to this building.

We are proud of our city and we are proud of our Bar Association. We are proud of the high personal character and professional ability of our Bar from time immemorial down to the present day. New Bedford claims a chief justice—John Mason Williams—of the old Court of Common Pleas, with his associates, Charles Henry Warren and Harrison Gray Otis Colby; likewise Lincoln Flagg Brigham, Chief Justice of the Superior Court, and his associates, Robert Carter Pitman, Lemuel LeBaron Holmes and Robert Fulton Raymond, Judge Raymond being the only one now living that hails from New Bedford. And I want to say that in our Bar we can duplicate all of those when the time comes.

We are now in the Old Dartmouth Historical Society's premises. I regret to announce that the Hon. William W. Crapo, who was to address you, is sick in bed and unable to be with us today. He is one of our first citizens, the oldest member of the Bar and one who tried cases before Chief Justice Shaw. So without further ado we will have luncheon served and after the luncheon we will have Capt. Tilton give you some information about whaling. He will tell you how the whale is caught, and most of you will want to keep your hair on when he tells you some things.

After luncheon Judge Milliken introduced Capt. James A. Tilton, a veteran commander of whaling ships, who gave an interesting address on the whale fishery.

After the address a vote of thanks was passed to Capt. Tilton, and a vote of thanks to the Old Dartmouth Historical Society for the use of their room. A group photograph was taken of the members on the deck of the model whale ship in the Museum.

### THE BUSINESS MEETING CONTINUED.

The business meeting was then resumed at the New Bedford Hotel.

**THE SECRETARY.**—I suggest that instead of going on with the various recommendations of the Judicature Commission we should suspend that discussion a moment and discuss a question relating to the Federal Courts. I understand that the problem of dealing with liquor cases particularly has created a very serious congestion there and there is a bill before Congress for the creation of eighteen more judges to deal with business in general in the district courts—floating federal judges, so to speak. I also understand that there is a proposition which has been made to create a federal magistrate's court of some kind to deal with these cases, a series of local federal courts similar to the state system of district courts, so that these smaller cases can be dealt with by them instead of coming necessarily before a district judge. Now the United States commissioners merely have the power to hold for probable cause. They do not have power to try out and settle a case, and it was suggested that it might be well to have that subject discussed at this meeting. Judge Morton is here; he knows more about the practical situation than anybody else. Perhaps he could enlighten us on it.

**THE PRESIDENT.**—Judge Morton, we shall be glad to hear from you.

**JUDGE MORTON.**—I shall be very glad to, because I always like to have any expression of interest in the Federal Court by the Massachusetts Bar Association. Activities of the Federal Courts are usually, I think, left too much to the American Bar Association. I am very sure that the Massachusetts Bar Association could do pretty good work by sometimes taking interest in practical matters in the Federal Court in the state and considering the needs of the Federal Court. The situation under the Volstead Act in connection with other recent

acts conferring jurisdiction over what we may call minor offences has been very serious. The Federal Courts, of course, were not originally supposed to deal with that sort of question. When they were organized the theory was that they should have jurisdiction of certain matters that the United States Government retained in its control, like admiralty, like the post office, like the coinage, bankruptcy, things of that sort. Underlying all that, they were established under the United States Constitution and are occasionally called upon to settle cases of rights asserted under the Constitution. That, as it lies in my mind, was the original conception of the Federal Courts—courts administering this underlying constitutional law when called upon, which would be but seldom; courts in everyday affairs administering the subjects of jurisdiction that were reserved to the United States and courts authorized where diversity of citizenship exists to exercise general jurisdiction.

Beginning perhaps fifteen years ago, Congress put on those Courts an increasing burden of criminal jurisdiction, running down often to trivial offences, and involving often young defendants, and requiring an organization which the courts did not have. The Volstead Act has very much aggravated the situation which was beginning to develop before. I cannot tell you how many Volstead cases there are pending in this district. I do not know that I would if I could, because it might not be wise; but I can assure you that the number is extremely large.

I do not think that the solution of the problem is in the creation of additional district judges. In the first place, you would have to have too many of them. In the next place, I do not think that Federal judges ought to be appointed to try rum cases and petty offences. That is not my conception, at least, of the position. Those petty offences, involving fines of from \$50 to \$100 or \$250, or imprisonment for a few months, are magistrates' court business, and they all, I think, ought to be settled by magistrates' courts held locally. I had a case yesterday, a very trivial case, originating up in Pittsfield, where the defendant had to come down from Pittsfield to Boston. The case could not come up and be disposed of yesterday and he had to go back to Pittsfield, and he will have to travel at least twice and probably three times from Pitts-

field to Boston at his own expense on a case where the upshot of it will be, if he is convicted, a fine of \$50. I think those cases ought to be tried near the man. He may owe \$50—he does not owe \$50 or \$60 more in traveling expenses as a penalty, to be put upon him whether he is guilty or innocent, to come down to Boston. So it has been suggested that the existing United States Commissioners should when necessary be authorized by the district judge to act as trial commissioners and given jurisdiction under certain designated acts—the Volstead Act, the Interstate Larceny Act, and one or two other acts of that character which create petty offences; that these commissioners should be given jurisdiction under these acts with power to hear and sentence under them. The defendants should have the same right of appeal as is now given from a state district court to the Superior Court. And in addition, in order to harmonize the disposition of the cases throughout the district, either the government or the defendant is in the proposed draft given the right of appeal on the question of sentence. I think that a valuable feature, especially as it concerns the government, because it will tend to equalize the treatment of what is about the same offence in Berkshire and Worcester and Boston and down here in New Bedford. That proposition has not as yet, I think, reached Congress. It is under advisement in the Executive Department, perhaps, or Administrative Department—I am not just sure where it is. But I would like very much to have the matter discussed at the meeting if it is thought wise to do so, and if anyone can suggest the right solution it might be helpful to go on record to that effect.

THE SECRETARY.—I suggest, Mr. Chairman, that this matter is perhaps one which might well be referred to the Executive Committee for consideration. Some account of the discussion of the subject can be printed in the report of this meeting in order to bring it before the Association as a whole.

MR. JAMES M. ROSENTHAL.—Mr. President, there is one thing that has been in my mind since the Volstead Act was passed, about the possibility—I presume it would require Federal legislation—of giving state courts concurrent action with federal courts in the enforcement of this type of federal criminal legislation. Judge Morton has spoken of the difficulties of a man from Pittsfield being brought down to Boston

and suggested as an alternative that he be tried before the United States Commissioner. Well, for one thing, there is only one United States Commissioner for Berkshire County, which is fifty miles north and south. It would require considerable expense to bring a man from North Adams to Pittsfield or from Great Barrington to Pittsfield. Another thing: The compensation of the United States Commissioner is practically entirely a matter of fees. I don't think that type of case should be left with a man who relies on his fees. If we put him on a salary basis there is the same objection to that that there is to the increase of federal judges, namely, that it is a largely increased expense. While it is true that there is a large congestion in the local courts, you will not find that in the western counties. Furthermore, you will find them more vigilant, because the local police and state police are far more apt to work in harmony with a local court judge than they are with a United States Commissioner. If there are no constitutional objections in the way, I should suggest that it would be well worth while to investigate the possibilities of clearing up these federal dockets and giving the district courts concurrent jurisdiction. The state courts today have concurrent jurisdiction in the matter of naturalization. They have concurrent jurisdiction in the matter of the Federal Employers' Liability Act. Why couldn't they have concurrent jurisdiction in this type of petty criminal offence?

THE PRESIDENT.—The Chair will entertain a motion.

THE SECRETARY.—Might it be put, Mr. President, in this way: That the Executive Committee be requested to consider some feasible plan for the consideration of these minor federal offences by local tribunals, without attempting to specify the form or character of the local tribunal, and then the suggestions that have been made at this meeting, together with any other suggestions which may perhaps be made before we get through with the subject, will be taken into consideration by the Executive Committee? I think that Committee would be very glad to have any other practical reactions of any members here on this subject, because, as Judge Morton says, it is of the same character as the problems considered by the Judicature Commission, except that it applies to the federal courts, which are quite as congested, I understand, as the state courts.

THE PRESIDENT.—Will you word your motion again, Mr. Grinnell?

THE SECRETARY.—That the Executive Committee be requested to consider some feasible method for the hearing and deciding of minor criminal cases under federal law by local tribunals, either state or federal.

MR. LOWELL.—Mr. President, there is one thing that occurs to me on that matter. I had occasion in revising the statutes to look into the Eighteenth Amendment a little and the decision of the Supreme Court and of our Supreme Judicial Court. As I remember the amendment, the state has concurrent power with the Congress to pass legislation. It is perfectly competent for our Legislature to pass some kind of legislation giving means for enforcing the federal law. So I should think, as far as the liquor traffic goes, that would be one way of getting at it. I am afraid if we get too much of the liquor idea in our heads we will not accomplish what his Honor wants. As I understand it, there are several matters, one of them relating to the Volstead Act and other matters relating to minor criminal offences. Now it so happens that as to the Volstead Act I think you could have local state tribunals take care of it, but I don't suppose you could with the others, so that would hardly accomplish what his Honor wants. In considering the thing it would perhaps be better to put it in the form of arriving at a means of taking away from the federal judges things which now take too much of their time and with which they should not be burdened, rather than laying too much emphasis on local tribunals.

THE PRESIDENT.—Do you understand the amendment, Mr. Grinnell?

THE SECRETARY.—Yes, I think I would accept the amendment of Mr. Lowell in this form: "consider what feasible method there may be for relieving the federal judges from the present congestion of minor criminal business."

The motion was carried.

THE SECRETARY.—We had been discussing the subject of criminal procedure this morning. Another important recommendation in the report of the commission was the bill relative to civil appeals from district courts, the subject of which was to extend the plan that has been in operation for about eight years in the Boston Municipal Court to the other district



courts of the state; to provide that the civil cases shall be heard finally by the district court unless they are removed to the Superior Court, and to provide appellate divisions in three sections of the state to hear appeals on questions of law, with the further appeal to the Supreme Court. The details of that bill were worked out in the draft submitted by the commission, and in that draft was also included a section to provide for an administrative committee of the district court judges throughout the state, consisting of the three presiding judges in the three sections of the state in which these appellate divisions were created, the members of that appellate division being appointed from time to time by the Chief Justice of the Supreme Judicial Court. This plan, if I remember correctly, both for doing away with double trials on the facts, creating these appellate divisions and creating this administrative committee, so-called, had the approval of the association of justices of the district courts at a meeting last winter, at which it was quite fully discussed after being considered by a committee of that organization. The point of the bill is that the whole plan of double trials on the facts, which originally existed in all the courts of the Commonwealth, including the Supreme Court, has been gradually abandoned, first in the Supreme Court and then in the other courts, the Superior Court succeeding to a large amount of the original trial-work of the Supreme Court. It was abandoned in the Land Court in 1910 after the recommendation of the commission that year. It was abandoned in the Probate Court by the act of 1919 and the commission recommended that the sooner it was abandoned in the District Courts and a feasible plan adopted for dealing with the situation and reducing the unnecessary double trials on the facts, the better. The bill as reported by the commission is substantially, with certain modifications and additions, the bill that has been supported from time to time by this Association during the past six or eight years and by a number of members of the Bar from different parts of the state. There may be some questions or suggestions which members have in regard to that matter. Of course the more business that can be disposed of in the district courts, the more effectively your system is working.

I should speak in explanation of one feature of it that has caused some discussion in the past—and that is the

question of the conditions under which removal is allowed by the defendant. In the Boston courts the defendant has a right of removal to the Superior Court by claiming a jury trial, and filing a removal bond of \$100, with the power of the court to exempt any defendant for cause shown from the filing of that bond. As matter of fact, I understand during the eight years that the act has been in operation there have not been more than two or three or some very small number like that of applications to be exempted from the removal bond. The commission reporting this bill to extend this plan included a provision for a similar removal bond, but also recommended that the plan was worth trying without the removal bond. That recommendation was made because of the fact that at some of the discussions during the past few years the requirement of a bond had caused a good deal of criticism from men from other counties. There is no reason whatever why the requirement of a removal bond cannot be omitted. In fact, the words which require it are bracketed in the report of the commission, so that they can be stricken out without recasting the act in any way.

Perhaps in this connection the other subject relating to the jurisdiction of the district courts might be mentioned, which is dealt with by the commission, and that is the question of the removal of the jurisdictional limit, which is now \$2000 in the Boston court and \$1000 in the other district courts of the state. The commission in its report stated that they saw no sufficient reason for the continuance of those jurisdictional limits, and they reported an act which would make it possible for a man to bring suit in any district court on a claim involving any amount, with a right on the part of the defendant to remove the case to the Superior Court without bond in any case exceeding in amount the present jurisdiction of the District Court. The conditions of such removal were practically identical with the provisions for removal in equity cases from the Superior Court to the Supreme Court which have existed ever since 1883, when the Superior Court was first given jurisdiction in equity; that is, that an affidavit should be filed that there was an issue to decide and — in that case it had to involve more than \$4000, in this case it would simply be that the case involved more than the present jurisdiction of

the court in which the case was brought, that being \$2000 in the Boston Central Court and \$1000 outside.

The reasons in the report of the Commission, which are also approved in the report of the majority at least of the Committee on Legislation, are that if both parties are satisfied to try a case of \$5000 or \$50,000 before a District Court, which is less expensive for the parties and the Commonwealth than a similar trial in the Superior Court, there is no reason why the Commonwealth should prevent them from trying it in that court. The free provision for removal fully protects the defendant and the right to bring his suit in the Superior Court originally fully protects the plaintiff if he wants to have ultimately a trial in the Superior Court; and if the parties do not want to have it there is no reason why they should be forced into it at the greater expense of everybody.

MR. ROSENTHAL.—As a member of the Legislative Committee at the time when this report was filed I took the liberty of writing my views concerning the propositions, and this was one of them in which I differed from the majority of the Committee in regard to the matter of jurisdictional limits. The Judicature Commission's proposal, which appears on page 141 of the special number of the Massachusetts Law Quarterly, January, 1921, the proposal numbered 6, starts off with a provision that —

“District courts shall have original jurisdiction concurrent with the Superior Court of actions of contract, tort or replevin, and also of actions of summary process under Chapter 239, and proceedings under Section 41 of Chapter 231.”

To that I have no objection. I do not see, as the Secretary explained, if both parties desire to try a case involving a larger amount in the District Court, why anyone should object. And if that were worded, “Where the parties by mutual consent desire to have it tried there,” I would be very much in favor of it.

THE PRESIDENT.—Why haven't they mutually consented where one man has brought the suit there and the other man, having the right of removal, has left it there?

MR. ROSENTHAL.—Before the defendant has the right of

removal under this act he must file an affidavit of merits and also pay an entry fee of three dollars. Now while it might be right and proper to require a defendant to file an affidavit of merits if it were required of the plaintiff, yet so long as it is not required of the plaintiff in the Superior Court today but any man can bring an action without an affidavit of merits and get a jury trial, I do not see why it should be required of the defendant. And I certainly do not see why a defendant should have to pay a fine of three dollars in order to get the jury trial which is given him by the Constitution.

THE SECRETARY.—If the plaintiff sues in the Superior Court and wants to have a trial there originally, asks for process in that court, he has to pay his entry fee. Is it unreasonable that the party who wants to have that court consider his case should pay the entry fee in that court?

MR. ROSENTHAL.—My objection would be this: That here the plaintiff can get out of paying that entry fee today by merely the process of entering his case in the District Court, which is not fair.

THE SECRETARY.—But he does not get out of it except for the reason that he is satisfied to try the case below.

MR. ROSENTHAL.—Why, no.

THE SECRETARY.—And if he wants to start his case in the Superior Court he pays his entry fee.

MR. ROSENTHAL.—Yes.

THE SECRETARY.—So that I do not see that it is unreasonable for the man who invokes the jurisdiction of the Superior Court to pay the entry fee required for that proceeding. As to the affidavit of merits, there again the affidavit is the same sort of affidavit as is required for removal from the Superior Court —

“of his belief that the matter involved in the suit exceeds” so many “dollars in value, . . . that his interest alone or with the interest of any other defendant having a joint or common interest with him exceeds that value, that he has a substantial defense, which shall be specified in such affidavit, that he intends to bring the cause to a hearing,” . . .

Now if he is not ready to make an affidavit that he has a substantial defense, that he really intends to try and that the

amount involved exceeds the present jurisdiction of the District Court or Municipal Court, why should he be allowed to carry the case up into the court which is more expensive for the public and the parties?

MR. ROSENTHAL.—My objection is, for the plaintiff originally to get his jury trial if he wants it he is not obliged to file an affidavit that he has a cause of action, and so long as he is not obliged to file that affidavit I don't see why the defendant should have to file an affidavit that he has a defense.

MR. HOMANS.—The plaintiff has to state a case, Mr. President.

THE PRESIDENT.—He has to state a case.

MR. ROSENTHAL.—Well, he has to state a case just as the defendant puts in a general denial, no more nor less.

MR. HOMANS.—He goes further than that.

THE SECRETARY.—He has to file something more than the defendant has to file. In fact, one of the difficulties of the whole mode of procedure today is the lack of any specifications in pleadings that amount to anything in many cases. One of the problems that exists now, as it always has existed, is to find some feasible method of trying to define issues. A considerable portion of the discussion in the report of the Commissioners is directed toward that problem of defining issues. The requirement in the case of a removal of this kind from a lower to a higher court seems to be a reasonable point at which to call for some more definite statement of issues than is involved in a general denial. I think that was the view of the Commissioners.

MR. NUTTER.—I think I might add this: It is really analogous to an affidavit of no defense. Of course if a plaintiff begins in the Superior Court he can at some stage of the proceedings file an affidavit of no defense, and the defendant is compelled to file a counter-affidavit, and if he cannot file a counter-affidavit the plaintiff gets a speedy judgment. Now the plaintiff begins in the lower court; if the defendant wants to get in the upper court he has to file an affidavit which is practically equivalent to an affidavit of no defense. As to the three-dollar fee, of course that is not enough to quarrel about; one could leave that out. But the object of this, the whole object was to allow the plaintiff to proceed as rapidly as possible to get judgment against a defendant

who had no defense, who knew he had no defense, everybody else knew he had no defense, but it is impossible, owing to the very dilatory system that prevails in Massachusetts, for the plaintiff to get his rights for an indefinite time.

MR. FORBUSH.—So far as the three-dollar proposition is concerned, it appears to simmer down to this: If the plaintiff wants a jury trial he enters the case in the Superior Court and pays three dollars. If the defendant wants a jury trial and the case has been entered in the lower court he has to pay three dollars to get his jury trial. It seems to me that is the thing reduced to its lowest terms.

THE PRESIDENT.—Are there any further remarks on that provision? Supposing we pass to the next, as the afternoon is moving.

THE SECRETARY.—“Declaratory Judgments,” “Discovery of Documents,” “Oral Examination of Parties before Trial,” “Equitable Process after Judgment,” and “Jurisdiction and Powers of Justices of the Supreme Judicial Court and Superior Court.”

There is one more matter relating to the District Courts, which I overlooked, and that is the matter of “Conflicts of Jurisdiction as to Domestic Relations.” I think very likely you are all familiar with the situation.

THE PRESIDENT.—And I think anyone would try and remedy it, would they not? It is a thing that ought to be remedied and everybody would agree ought to be remedied.

THE SECRETARY.—It is merely a matter of practical measures thus suggested for dealing with them. The matter of declaratory judgment is a plan which has been discussed all over the country and the suggestion here is adding this subject to the equitable jurisdiction of the court. We are familiar with the subject in the Land Court and instructions to trustees and in various other proceedings under different names. The suggestion here is to extend it as a practicable method of settling controversies which has worked in other places. There seems to be no particular reason why we should not be able to make it work.

The suggestions in regard to jurisdiction and powers of the justices of the Supreme Court and the Superior Court are contained in three separate acts; one to extend the concurrent jurisdiction of the Superior Court to cover all the pre-

rogative writs except those in the nature of appeal. Another bill is to provide that the judges of the Supreme Court shall have all the powers of the judges of the Superior Court and be enabled to act as if they were judges of the Superior Court, thus bringing the courts somewhat closer together and, as suggested in the report of the Committee on Legislation, enabling Judge Crosby when he is in Pittsfield to issue an order of notice returnable in the Superior Court or some other process of that kind, so that it may not be necessary for counsel in Pittsfield to travel to Springfield to get at a judge. There seems to be no reason why the judges of the Supreme Court should not have the powers of judges of the Superior Court, so that they could use them if they found it expedient. It seems to make the system more adaptable to the work which is to be done. As the Committee on Legislation suggests, it is not expected that the judges of the Supreme Court are going to march into the Superior Court and try cases all the time; they have too many other things to do. But it might be very useful and valuable for everyone that they should have these mutual powers. The other suggestion contained in the same act, being that if necessary in order to expedite business or for special reasons in the Supreme Court, a judge of the Superior Court could be called in by the Chief Justice of the Supreme Court after conference with the Chief Justice of the Superior Court to sit as single justice and hear matters in equity or in prerogative writs pending before the Supreme Court, seems equally desirable.

The matter of discovery of documents is a suggestion that an affidavit of all relevant documents could be called for, similar to the affidavits required in some other jurisdictions, and then the documents therein specified should be produced under orders of the court under the direction of the court for inspection, and the proposal for oral examination of parties before trial, is an extension of the idea of discovery along the lines of the New Hampshire and Wisconsin statutes which enable parties to take the oral depositions of the other party in advance of trial without the restrictions of depositions that we have here in Massachusetts. It gives an opportunity for oral examination instead of the complicated and difficult process of discovery by interrogatories. In New Hampshire they go further and provide that the deposition of any wit-

ness can be taken and used, without the restrictions that we have here in Massachusetts, unless the witness is present at the trial, and then he can be called. The conditions under which the deposition is taken in Massachusetts, for instance, do not have to continue at the time of the trial in order to enable the use of the deposition.

All those recommendations of the Commission are made in line with the plan already spoken of, of defining issues in advance of trial so far as practicable, in order to avoid trial on unnecessary issues and undisputed issues.

THE PRESIDENT.—One more that you have not spoken of, and that is “Equitable Process after Judgment.”

THE SECRETARY.—The equitable process after judgment is a suggestion that, particularly on claims for necessities or labor, the procedure of the district courts should be simplified and made more direct.

THE PRESIDENT.—There are, Mr. Grinnell, no criticisms on these five?

THE SECRETARY.—Well, I am not so sure about that, Mr. President. I think there may be, although some of the members may be somewhat modest in their expression. There are practical legislators and lawyers here who know as much as I do about it.

THE PRESIDENT.—I will interrupt the proceedings so far as to say that we have been very pleasantly entertained in New Bedford; we have enjoyed the hospitality of the New Bedford Bar Association and they have given us a most excellent lunch and a very pleasant chance to visit the Museum, and it seems to me that it would be but right for us to pass a vote expressing our gratitude for their treatment of us and that a copy of the vote should be sent to the president of the New Bedford Bar Association.

The motion was made and carried unanimously.

THE PRESIDENT.—Now we will go back to the other matters.

MR. SULLIVAN of Lawrence.—Mr. President, if I may interrupt—

THE PRESIDENT.—Certainly.

MR. SULLIVAN.—I would like to have incorporated in that motion a letter from Mr. Grinnell on behalf of the Massachusetts Bar Association to the directors of the Old Dartmouth Historical Society for their courtesy.



The suggestion was agreed to.

MR. ADDISON L. GREEN.—There is lurking underneath these proposals a very practical suggestion, and it seems to me there are enough lawyers here, practical triers of cases, to shed light on it. The object of the recommendations is really to define issues, which means to compel parties in a measure to disclose their cases. I am going to confess that in the early days when I started practice lawyers didn't try cases that way. We didn't show the fellow on the other side anything we didn't have to. We got all we could get and kept all we got. I am free to confess as a member of the Commission that when I approached these problems I approached them in that spirit. But I became convinced, as I suppose many of us get convinced as the years go on, that after all there is something bigger and broader in the trial of a case than playing one's trumps a little more skilfully than the other fellow plays his. That is the issue here. How far are we as lawyers, practical trial lawyers, prepared to throw our influence in the way of legislation that will define issues? For instance, suit is brought on a promissory note. Either the defendant owes it or he has some definite defense, he has paid it or it is outlawed or something similar. Ought the defendant to deny signatures, file a general denial, set up payment and every other possible defense and thus compel the adverse party to prepare to meet them? Is there any reason why the real issue should not be immediately defined? That is where the English are superior to us in the trial of cases. They try the thing that is in dispute. Sometimes we try everything but the thing that is in dispute. It is, therefore, proposed that we define issues in advance of trial or it is proposed that the parties go before a judge or a commissioner and the plaintiff is to say, "That is the thing I claim;" the defendant is to say, "That is the thing I dispute."

In addition, can we not provide some method of taking the oral depositions of parties in advance of trial, and thereby simplify and shorten the case? You see this is altogether an effort to reach the basic fact or facts in dispute in a case and to find a business-like way of trying it. There is a feeling among laymen today that a lot of time is wasted in the law courts. I think much of it is unjust, but I cannot say that

all of it is unjust, and so far as it is just we as lawyers ought to provide a remedy.

Now, how far do these recommendations meet the approval of the members of the Bar? It is very well represented here tonight. It is a good opportunity to get at what our Secretary calls their "mental reactions."

JUDGE MORTON.—I will make another suggestion. When you look at the average lawsuit and consider the time between the time of the beginning of it and the time of settling it, you will find that 50 per cent of the time in a case involving a substantial amount has elapsed between the verdict and the final judgment. In other words, I think I am well within bounds when I say that 50 per cent of the "law's delay" is caused by appellate proceedings.

Now in my day — of course I have lost touch with the state docket, but in my day it was perfectly possible in Bristol County to try a jury case just as soon as it ought to be tried if you followed it up personally. What happened then? The party that was beaten had the burden of carrying forward the appeal. Was he keen about it? Of course not. Did he hurry it forward? Certainly he did not. He delayed until the man on the other side jacked him up and finally the judge and the other man would jack him up and the bills of exceptions were filed and the case would be argued on the appeal.

Now it seems to me that if we are really in earnest about this thing, where we want to start in is from that end of it. Just for the sake of discussion, my own view, which is very clear and strong — I will admit it is — is that as a country we are greatly overdoing the appellate business. I sit occasionally as an appellate judge; I sit most of my time as *nisi prius* judge and I see both sides of the matter. Would it not be a great and advantageous change if we said that the verdict was the final word, if we abolished all right of appeal, if we put all appeals beyond the Superior Court on the same basis that *certiorari* is now put on from the United States Supreme Court to the Courts of Appeals? In other words, a man loses in the Superior Court; then let the losing party have the right to go to the Supreme Court just as you can go to the Supreme Court now in Washington to say that your case has been erroneously dealt with, not in some little way, but that fundamentally you have not had justice. *Ex parte* you can do that.

If you make out an *ex parte* showing, let the Supreme Court order the case up. You must do that within thirty days, and then within thirty days after your verdict, if the *certiorari* has not been granted your verdict stands. That would be my view of the place to save time in cases. When it comes to the trial of cases — well, I tried them a good many years ago and perhaps am rather hard-shelled.

MR. JAMES E. MCCONNELL of Boston.—I want to throw a few suggestions into the limelight here. Following Judge Morton's remarks, I think in Boston at least there is one delay on the part of business men trying to obtain justice that causes more trouble than anything else, and that is in trying to bring suits on long accounts involving their business relations with some other litigant. These cases always must go to an auditor. Under our present system of auditors time is wasted in trying to agree upon the dates for hearings. One man is tired, one man has got something else to do; it runs along a long while, waiting for auditors' reports. The result is that many associations in Boston, like the cotton and other commercial boards, have their own boards of arbitration rather than go to the courts. A thought was suggested to me by Judge Sanderson which came to him from Moorfield Storey. It struck me as a good idea. In order to do away with the present system of masters and auditors, which causes long delay, but to whom cases must be sent where a jury trial is involved in order to avoid a long hearing in the court, it was suggested that a master's court be established, with masters appointed by the governor, similar to judges. When a jury trial is claimed and where it is asked that the case be sent to an auditor, and now it cannot be sent to one of the judges but must be sent to an auditor or a master, have auditors and masters appointed either by the governor or by the courts and a master's court held where you can have those trials continuously, where you can have men of calibre, equal or nearly equal to judges, on a regular salary, instead of sitting at \$25 a day, for which a man cannot give his time when he has more important engagements. Under this plan, with a master's court holding continuous sessions, cases sent to it would receive speedy action. That was Mr. Storey's suggestion to Judge Sanderson, and Judge Sanderson, when I was before him in regard to appointing an auditor, talked

that matter over with me and I felt it was a wise solution of the difficulty today in masters' and auditors' cases.

MR. SULLIVAN.—On any of the matters that have been discussed here there has not been a great deal of discussion, and it seems to me the reason there has not been is that there is not very much difference of opinion, as the President suggested, among us here about the advisability of these matters. The trouble is, whatever we say here is a sort of academic discussion; and these are practical questions. For instance, the measure before us which would have most practical effect in decreasing the congestion of the courts, namely, the adoption of the Boston Municipal Court system by the District Courts, has had practically the unanimous support of this Association for six or eight years, and yet it has not been adopted by the Legislature. This body, I think, has voted on it several times; it surely has discussed it several times and with much unanimity. It is apparent that the ideas of this Association are not being carried into practical effect, and it seems to me that we ought not to be discussing so much the advisability of these matters as perhaps the question why they have not been adopted, and see if some practical means for getting them adopted should not be adopted by this Association. The question of how to put them into effect is now becoming important, rather than the discussion of whether they are or are not advisable. In connection with that a beginning might be made by some of those who have appeared before the legislative committees, and who could suggest to us what objections have been made by those who have opposed them, and perhaps give us the reasons why the Legislature has not adopted what seem to be approved by the unanimous opinion of this Association.

MR. MITCHELL.—Mr. President, I am entirely in accord with the recommendations that are before us. A suggestion has occurred to me — I don't know whether there is anything in it or not, but there is one proposal that the Chief Justice of the Supreme Judicial Court shall have the power to call in a Justice of the Superior Court to sit in the Supreme Court. As I understand it, the Supreme Court is a constitutional court, established by the Constitution. All other courts are statutory courts. The question is this: The justices of the Supreme Court get their jurisdiction by virtue of the Con-

stitution. Has the Legislature power to say that any other judge can exercise the functions of a judge of the Supreme Court who gets his power by virtue of the Constitution and not by virtue of any statute?

THE SECRETARY.—I think perhaps I can answer that question so far as the Commission has dealt with it in their report. It was thought that that question might arise if it were proposed that a judge of the Superior Court might be called in to sit with the full bench on appellate matters as a court of last resort; but so far as the calling in of a Superior Court judge to sit as a single justice was concerned, the Legislature had the power of regulating and adding to or taking away the jurisdiction of various courts, as they have exercised that power from time to time in transferring jurisdiction from one to another, and that as a matter of fact a Superior Court judge thus called in to sit as a single justice in the Supreme Court would be simply exercising functions in one courtroom in the courthouse which he already has or might be given authority to exercise in another courtroom in the courthouse called the Superior Court. So the Commissioners felt, so far as sitting as single justices is concerned, there was no constitutional difficulty and it might arise only if it were suggested that Superior Court judges should be called in to sit with the full court on appeals.

Answering Mr. Sullivan's question as to why the District Court of Appeals bill has not been adopted hitherto, so far as my connection with that bill has been concerned, as I have appeared several times before the Judiciary Committee, the reasons that I have heard expressed before the committee have been various, such as an objection to a requirement of a bond, which, as I have already explained, could easily be eliminated; the varying amount of distrust of different district court judges or special justices in different parts of the State; a certain amount of prejudice against the plan in the Boston court and the idea of not having free appeal on the facts and a certain amount of natural conservative inertia which is peculiarly characteristic of the bar that does not like to change things. That has always been very strong and still is. The Commission in discussing these various subjects has expressed its feeling that in spite of whatever criticisms are made of the District Courts and some of the judges in differ-

ent parts of the State, there being a very considerable number of them, the Commonwealth has been receiving good service from the District Courts and that they are capable of rendering a great deal more service if we put more responsibility on them, and that the plan of placing more responsibility on the District Courts, giving them more opportunity to use the judicial power which they have or might have, will gradually develop the existing men, bringing out the best work that they are capable of, and will have an effect in gradually improving the appointments to those courts all along the line. There is now a very considerable waste of judicial power as well as of money involved in the administration of the courts in the present system which involves a duplication of function. I think those are the two sides of the thing as I have seen them expressed before the Legislature.

MR. WILLIAM A. DAVENPORT of Greenfield.—Mr. President, I didn't intend to say anything. My recollection about this proposed bill relative to the District Courts is that it eliminates appeal except on questions of law. Am I right or wrong?

THE PRESIDENT.—I think you are right.

MR. DAVENPORT.—That being the case, you are relying upon the human element altogether, and that is just the difficulty in life and in the practice of law. If the human was infallible we would not need any appeals, but that is not the case. It does not make any difference how good the judge is, he is liable to err, and if he errs the party should not be obliged to lose by it; he ought to have his right of appeal. So I should oppose and shall always oppose any procedure which attempts to curb the right of appeal of a party from a district court or from a superior court.

THE PRESIDENT.—That is, from a single mind.

MR. DAVENPORT.—From a single justice.

THE PRESIDENT.—Yes.

MR. DAVENPORT.—I have been in practice twenty-five years and I have tried in all courts, State and United States, and I find the human element comes into it all the time. The best illustration I have of the situation was sprung by the presiding justice of the Circuit Court of Appeals a few years ago, when one of the noted Boston attorneys wound up his brief by saying that the decision of a justice of the District Court

of the United States who had spent so many years as judge of that court and had spent his entire life in the study and practice of a certain branch of law ought not to be lightly set aside. The presiding justice told the gentleman that he has been practicing, to his personal knowledge, forty years before that court, and that the Circuit Court of Appeals was established for the purpose of correcting errors of the lower courts, and if error existed it would be corrected. That is the whole thing in any court; if error exists it ought to be corrected. Some one, I don't know who it is, because I have not had the time to look it up, fixed it so that you could not appeal from a decision of the judge of the Probate Court except on questions of law and on his report, a most unjust law, a most unjust thing for the parties interested.

Lawyers as a general proposition know pretty well whether their clients' interests are being taken care of by the court or whether they are being sacrificed, and when a lawyer feels that the interests of his clients are being sacrificed either by a charge to the jury or by the case being decided erroneously on facts by the court, his client ought to have a right of appeal. So far as this district court proceeding is concerned, it never ought to become law. As a general proposition things run along pretty well. I have a general notion that it is mostly theorists who are working on this proposition, not men who are practicing law all the time.

I don't think of anything more that I can say, except that I oppose any more of those proceedings which will curtail the right of a party to appeal. It is not a question of a lawyer, it is not a question of expense; it is a question of right and wrong. And we ought not as a Bar Association to undertake to say to litigants, "You shall not have a right of appeal."

MR. WILLIAM G. McKECHNIE of Springfield.—Along the line of brother Davenport's remarks, in Springfield we have three excellent judges in our District Court — Judge Heady, Judge Malley and Judge Lyford, all of them extremely conscientious, possessing the absolute confidence of the bar and all of them first-rate lawyers. Their decisions of law are generally satisfactory. I will venture to say that less than ten per cent of the cases entered in our District Court are appealed, and these cases are appealed generally on questions

of fact where the lawyers and clients are dissatisfied with the court's decision of fact but not with the application of the law. It might be, however, that such a law would result in great improvement in the decisions of the district judges, as they would dislike very much to be overruled by a court established from their own body. I do not believe that the application of the law, however, would work as harmoniously in western Massachusetts as it would work, for example, in a big city like Boston. I am not very emphatic in opposing an experiment of this kind and would not go so far as to offer opposition to the passage of the proposed law.

The meeting then adjourned at 5.45 P. M.

F. W. GRINNELL,  
*Secretary.*

#### ADDRESSES AT THE DINNER

THE PRESIDENT.—There is in the northern part of Ohio a tract of land representing three or four counties which used to be called the Western Reserve. In the center of that tract is the city of Cleveland. The tract was settled in the latter part of the eighteenth century by settlers from Connecticut and Western Massachusetts, and there ought to be a warm spot in the heart of every New Englander for anyone who comes from that section. For 130 or 140 years they have had their civic governments, their courts, and they have been held up as a model to the United States for what they have done and what they have accomplished.

Two or three years ago there seemed to be a wrench that had been thrown into that machinery. The courts did not seem to function and the civic government was weak and ineffective. But with that same feeling of pride in their country and pride in their city they adopted a novel way of dealing with the matter. They established with the financial assistance of the Cleveland Foundation a survey. That is, they organized committees to look the matter over, see where the fault was and devise methods of improvement. Wisely, they took their advisers from among persons outside their own city or their own country. They went to Roscoe Pound of Harvard Law School and Prof. Frankfurter and made them their advisory committee. Each one of the investigating



committees — and there were half a dozen of them — having to do each with its own branch, were selected from outside the state, and Messrs. Reginald H. Smith and Herbert B. Ehrmann were selected from the Boston lawyers as the ones to deal with what perhaps was the worst question that they had to deal with, namely, the criminal courts and the failure of justice in those courts. The citizens of Cleveland also took part in this and an advisory committee was formed to help in the investigation and dealing with the matter. They needed a man at their head who was fearless, bold, a man of marked position as a lawyer and a man who was assiduous, was really insistent on having his way. They selected as the chairman of that committee the guest whom we have invited here to address us on that subject. We ought to have a warm spot in our hearts for him, for he is practically one of us. He was born in Newburyport, he was graduated at Williams College and his sons are now there. I think we ought to give him a warm welcome. I introduce to you Mr. Amos Burt Thompson of the Cleveland Bar.

#### ADDRESS OF AMOS BURT THOMPSON, ESQ.

*Mr. President, Ladies and Gentlemen of the Massachusetts Bar:*

The remarks of your president indicate that I am the only subject concerning which he is misinformed. They say that a lie travels faster than the truth. I hope when the truth strikes Boston and it goes through the crooked streets of that city to that lovely home on Beacon Street, that it will become so distorted that your president will really never know how unworthy I am of the kind remarks he has made in introducing me.

He has referred to my birth in this State and my education. I cannot speak of it without feeling, because my mother and father and I spent many very happy years in this State. I am passionately fond of Massachusetts. Although I have lived forty years in Ohio, and Ohio has been good to me, I often think when I pass through the western part of this State, to which I am particularly devoted, of that sentence which I probably misquote when I say: "God's fingers touched but did not press when they made this country." It is a

peculiar pleasure to come here and mix with you, to listen to your talks today. I think I understand a little better, Mr. President, now that I know some of the Massachusetts Bar, why it is when we seek a precedent we have always rushed to Massachusetts cases.

Your Secretary, when he wrote me, said I could talk as long as I wanted to. If I applied a literal construction to that I would have come and sat still and listened to you. I don't know whether your Statute of 1656 is still in force or whether it does not apply to non-residents. I refer to the one that fined any lawyer twenty shillings who talks more than an hour. I have my watch before me and I shall not run the risk of violating it.

Before I say anything in reference to the Cleveland Survey, which I am here to discuss, I wish it understood that I am proud of the city and proud of the bar. Things have occurred there of which I am ashamed. But it would convey quite a wrong impression if I came here to discuss Cleveland as a wicked city. It was kind of Dean Pound when he was there to say that the people of Cleveland demonstrated their merit in that it was the only American city which had ever asked anyone to come and survey it. You may get a better picture of conditions there and a better picture of the reasons for the survey and what it has attempted to do if I refer to the causes that led up to it.

Carrying your mind back to the years 1916 and 1917, there was in Cleveland, as I fancy in other cities, a let-down in the moral tone. Cleveland, I think, is as good a city as there is in the country when you consider its size and its rapid growth, when you consider its heterogeneous population, and particularly when you consider that we have not what you are favored with—we have not appointed judges; we have the elective system. During 1916, '17, and '18 there was a prosecuting attorney in our city who, by reason of some things that he did and had not done, was under suspicion. In December, 1918, the attention of the Bar Association was called to this subject as the result of a statement made at one of our meetings to the effect that the prosecuting attorney and his office were under suspicion. This resulted in the appointment of a committee to investigate. I would like to read two or three sentences from the report of that committee.

It was a courageous report and a situation that was difficult to handle.

The report opened by stating that it had been publicly stated at the December meeting of the Cleveland Bar Association that the administration of justice in the criminal courts in Cuyahoga County was under suspicion. I will not burden you with anything but one or two short quotations from that report, which is remarkably well written.

"It is our general conclusion, based upon the facts before us, that the primary cause of the questionable conditions affecting the criminal situation in Cleveland is a breaking down of the efficiency of the various departments and instrumentalities of justice in the criminal courts. The result of this has been the failure of the fundamental purpose of the criminal law, to wit, to afford adequate protection to the citizens of the city in their lives and property. This deplorable condition is the penalty of laxness which has given Cleveland the name of being an easy town to all the worst criminal elements throughout the country. Vigorous law enforcement alone can correct the condition by all charged officially with this duty, both administratively and judicially.

The criminal statutes are adequate for the purpose, with here and there some minor amendments, several of which are in this report suggested. The city is only now reaping the result of a system of toleration, laxity and inefficiency in public office and leniency to the criminal elements indulged in during the past years and the sacrifice of the rights and privileges of citizens, and has arisen principally through political expediency.

Nevertheless, we would be derelict in our duty if we did not express our conviction that the short and uncertain tenure of judges results too frequently in a departure from the high standards of law enforcement which is necessary to impress criminals with fear of the law."

The report then passes on to a discussion of the laxity being due in part to the elective system.

The report was startling, although it accomplished nothing in the Bar Association.

But about that time the Legislature passed a bill which resulted in the appointment of two special prosecutors. That appointment was necessary because the prosecuting attorney himself was to be investigated, and unfortunately our law does not confer upon our attorney general the powers possessed by that officer in this State.

I think there was an initial mistake which proved somewhat detrimental to the success of that investigation. They made a bi-partisan appointment. Two very excellent men were appointed, but one was appointed, not for his ability alone, but because he was a Republican. The other, a very able and estimable lawyer of excellent standing, was appointed because he was a Democrat. That gave the investigation a partisan feature, which I think was an embarrassment when later they dealt with certain problems.

The grand jury was in session some months and they made a report criticizing with a good deal of vigor some matters in the police department, some matters in relation to the prosecuting attorney himself, said that the prosecuting attorney should resign, said that the director of safety, who, under our charter, is in charge of the police, should be removed by the mayor. They made various similar statements, but nothing came of it.

The two special prosecutors worked vigorously for five or six months. They were public spirited enough to serve without pay, but I do not think they were successful in creating public confidence. I do not think the people of the city felt that they had dug down really to the roots of the situation. It was a mere head-hunting expedition, and since they returned with no scalps except the scalps of a few unimportant persons who were charged with having committed perjury before the grand jury, and later these indictments were nolle. Since the investigation was therefore bare of results, the city considered that it had been a failure. I don't mean to criticize the men who conducted the work, because they are friends of mine and of high character. Perhaps I should add the prosecuting attorney did not take the hint, for he did not resign.

On May 7, 1920, about midnight, three men met on the corner of two of our prominent streets in the downtown district. One of those men was shot in the back. His name

was Kagy. The name of another was Joyce, a rather disreputable person who had served when he was doing any real work as a bartender and a man who had been arrested a good many times. The identity of the third man has been a subject of a good deal of dispute.

You will get the picture of the location if you will carry in your mind for the moment the letter L, and those of you who are familiar with Euclid Avenue will treat the long part of the L as Euclid Avenue and the short part as a north and south street called East Ninth Street.

The admitted facts are that this man Kagy and this man Joyce and the Chief Justice of our Municipal Court went down Euclid Avenue until they came to East Ninth Street and the auto turned north on East Ninth Street.

These dinner tables furnish a good illustration, if the long one may be used to illustrate East Ninth Street and the shorter one Euclid Avenue.

The dispute is whether the chief justice left the automobile a few hundred feet north of Euclid Avenue or whether he proceeded down East Ninth Street past St. Clair, past Superior, past Hamilton, to the point where the automobile stopped. It was his automobile. He says he got out of the machine two or three hundred feet north of Euclid Avenue, that he did not proceed the thousand additional feet to Hamilton and East Ninth. He says he was not at the scene of the shooting.

There were four policemen within five hundred feet. These three men were wrangling about money on the corner. They were all in a maudlin condition and one very drunk. Three policemen passed on the sidewalk, the same side of the street, at 12.30 or 12.35 in the morning. The light was adequate. The ex-chief justice is a well-known person, for he occupied that position for eight or nine years. The other two persons were disreputable and should have been known to the police. There were, you will observe, four police within five hundred feet, and two of them were on the same side of the street. When the shot was fired those two were walking north towards the Lake and were 330 feet from the scene of the crime. They were able to turn around and run back and catch Kagy before he fell, but they could not see the drunken Joyce staggering south, nor the big man going diagonally across a

99-foot street and down a side street, nor could the other two policemen who had proceeded on the other side of the street, who had gone down such a distance that they were on Lakeside Avenue only fifteen feet west of East Ninth. They heard the shot but they claim they could not get around in time to catch anybody.

Joyce in fact, was not arrested for four or five days, they caught him when he surrendered. He was tried and he was acquitted. McGannon, the judge, was then tried. The jury stood 10 to 2 for conviction.

I think there are very few people in the city of Cleveland who are charitable enough to think that Judge McGannon was not present. I think it might be said that nearly everyone thinks that he was present at the scene of the crime, although there is a great difference of opinion as to whether he fired the shot. Personally I think Joyce killed Kagy, although I believe McGannon was unquestionably present.

The first trial was 10 to 2, McGannon claiming an alibi. He brought along many witnesses who claimed they saw him get out of the automobile two or three hundred feet north of Euclid Avenue, and he claimed that from that point he went down Superior Street, and that he was not within seven or eight hundred feet of the scene of the crime.

The second trial took place some two or three months after the first—to be exact, in the month of March, 1921—and resulted in a verdict in favor of McGannon.

You will remember that three men met on a street corner. One was shot and he had died. The other two had been judicially determined to be innocent, and it therefore had been judicially decided that Kagy had committed suicide.

This was a little too much for us to stand. A wave of criticism went over the town. People had watched the first Joyce trial with criticism, the first McGannon trial with increased suspicion, but the second McGannon trial was such as to cause an outburst of indignation.

I have repeatedly said that McGannon performed a divine service for the Cleveland Bar in that he created a resurrection. Having been a member of the Executive Committee of our Association for some years, it is not inappropriate for me to say that our Bar Association as a social body has been a delight; as a memorial organization we have paid fitting

tribute to the worthy dead, but we have neglected to attend to the unworthy living.

But the second McGannon trial made a vital, living force out of the Bar Association.

The Foundation Survey had been decided upon after the first McGannon trial, therefore, between the first and second McGannon trials. I was not on any of the committees of the Bar Association; I was not an officer of the Bar Association. The credit that I think is distinctly due to the Bar Association it is quite proper for me to proclaim, because I had no participation in the affair. The chief justice had the impudence to go back upon the municipal bench and the Bar Association had the courage to serve notice upon him that he must leave that bench at once, and he did. They immediately took it up with the Governor and practically issued an order to the Governor that he should appoint John Dempsey as successor, and Governor Davis was accommodating and he acquiesced, that is, he appointed our nominee.

The Association immediately started to raise a subscription fund to prosecute the persons who had plainly perjured themselves. One of our leading trial lawyers, Mr. David, was selected, and the prosecuting attorney was wise enough and considerate enough to make him a special assistant at a dollar a year, and the prosecuting attorney worked with Mr. David on these cases. They convicted some six or seven of perjury, and obtained some pleas of guilty. They convicted McGannon of perjury. They filed an information charging various witnesses with contempt and the hearings in two of those cases have taken place. McGannon has been found guilty of contempt, the contempt consisting in perjury before Judge Powell in the second trial.

His junior counsel was charged with being implicated in a conspiracy. The court severely criticized him, saying he did not believe him, but felt that the evidence was not adequate, owing to the quasi-criminal character of a contempt proceeding to justify finding him guilty. The senior counsel has never been included in any of the suspicion and all feel great regret that he was connected with the litigation. He is a man of standing and one of our best trial lawyers, and there has been no criticism of him.

The Cleveland Foundation, as the president has said,

started this survey, and you may be interested to know that the Cleveland Foundation is an organization, really the outgrowth of some ideas of Mr. Goff, somewhat patterned after the Carnegie Foundation. The Foundation felt that there would be greater confidence in the work if the work was done by outsiders. I think they were entirely correct. Not that you could not trust the Cleveland Bar, but the Cleveland public wanted the job done thoroughly and felt that it would be done better, more efficiently, if done by outsiders.

As you know, Dean Pound and Prof. Frankfurter were kind enough to agree to direct the survey. They chose Messrs. Smith and Ehrmann to have charge of the report in reference to criminal courts; Mr. Alfred Bettman of Cincinnati, who for nineteen months was assistant attorney general and argued the Debs case in the Supreme Court of the United States, to deal with the subject of prosecution; Mr. Albert M. Kales, an attorney from Chicago, to handle legal education. Dr. Herman M. Adler, state criminologist for the State of Illinois, was kindly loaned to us by that State. Mr. Burdette G. Lewis of New Jersey made the investigation in reference to penal institutions and Mr. Raymond Fosdick of New York, was kind enough to take the department relating to police.

As Mr. Smith has described the work of the survey in a recent article in your magazine, I will not take the time to give details.

An advisory committee was appointed, composed of some thirty-five people, and I happened to be chairman. The name sounded attractive, and we all were puffed up with the idea that we were going to advise Harvard professors, but we found that in practice we were a mere kicking strap that had been skilfully inserted between the hoofs of the bar for the purpose of protecting the professors and the Foundation Committee.

As you know, Cleveland is larger than Boston, but it is composed of a larger percentage of foreign born. A large percentage of the citizens of Boston come from the British Isles, but we, on the other hand, have drawn largely from eastern Europe. As the result, our problems are more complicated.

The work relating to criminal courts has been finished, the



work relating to police has been completed, the work relating to prosecution has been finished and those reports have been made public. The others have not as yet been made public.

You may ask, what have we learned by the survey? We have been made more conscious of the extent to which criminal practice is shunned by certain types of lawyers. I am just as guilty as anyone else, because although there are fourteen in our organization, we take practically no criminal business. I have no special suggestions or remedies. It is a difficult problem to deal with, and yet we must keep in mind where those cases are going to gravitate if the rest of us refuse to handle them. If we will not handle them, we owe a duty to ourselves, the profession and the public to see that they are handled by men of integrity and honesty.

We find not the slightest reason on earth for doubting the integrity of any of our judges. We do find that there is particularly prevalent the baleful influence of the lawyer who practices more politics than law. That is naturally more harmful in a community where the elective system prevails.

We have a non-partisan ticket and it was thought that this would remove the judiciary from politics. It is certainly debatable whether it has been an improvement. Candidates no longer have behind them a political party, and in the nature of things they are pretty nearly forced into forming a political committee—at least they seem to think so—and they are forced into a type of advertising that certainly unfits them for the bench. There is now a judicial campaign going on in Cleveland. John Dempsey's appointment as chief justice expires with the November election and he must run for the office, if he is to continue to serve. A man named \_\_\_\_\_ and a man named \_\_\_\_\_ are running against him, and it may interest you to see to what lengths some political advertising goes. (Producing a card.) That is a card put out by thousands. That is a small one, but it illustrates the mental attitude, of course, of an extreme type. I shall not vote for this man; many others will not, but there is grave danger that the majority will; and I say that a man who has that attitude towards the bench is unfit to sit on it.

We have a situation in Cleveland that is different from what you have here, if I understand your law correctly. We

have a division of responsibility which is full of defects and is one of the fundamental causes of our present situation. Right here let me say that the directors of the survey, Dean Pound and Prof. Frankfurter, from the beginning have made it plain that this is not another head-hunting expedition. To illustrate, we are not trying to solve the mystery of the Kagi murder. We are not trying to determine that question. We are trying to analyze and determine the conditions and the causes that have made a McGannon possible.

Take our prosecuting attorney situation. Our prosecuting attorney is similar to your district attorney. He is elected, as your district attorney is elected. But the county prosecutor has not the functions nor the power that your district attorney has. His duties are divided in this curious and unfortunate way. The county prosecutor is elected and has charge of the grand jury in the prosecution of felony cases. Misdemeanors, preliminary hearings, etc., are conducted in the police court, into which the prosecuting attorney does not enter. The police prosecutor, as we term him, although that is inaccurate, is an assistant to the Director of Law. The Director of Law is known in some states as City Solicitor. He is appointed by the Mayor. In other words, the prosecuting attorney is elected; the attorney for this city is appointed by the Mayor. Sometimes the county prosecutor is a Democrat and the Mayor is a Republican. When this takes place we have a Director who is a Republican and therefore police prosecutors who are of that party. When the county prosecutors and police prosecutors are of opposite politics there is frequently no harmony and there is certainly no power that can compel them to co-operate. This division of responsibility is prolific of mistakes and confusion.

The location of our courts is also bad. We have five buildings; two are adjacent to each other, the others are separate. Two are new and three are old—old even for our city, and not modern in the appointments.

This survey, of course, is concerned exclusively with the criminal branch. In other words, it is a survey relating to criminal justice in Cleveland and has nothing to do with the civil branch.

Our municipal courts have rather extensive jurisdiction, in some respect, I think, broader than your district courts,

but when it comes to crimes of the class of felonies they have no jurisdiction except to conduct the preliminary hearing. The man is bound over to the Court of Common Pleas—or railroaded over is probably more literally correct. About 90 per cent of the business of the Court of Common Pleas originates in the Municipal Court.

The situation in reference to the number of judges is unfortunate. We have ten municipal judges for the city of Cleveland. They are paid what I think is an adequate salary of \$7500.00. The Common Pleas Judges are paid \$8000.00, but only two of the ten municipal judges ordinarily devote themselves to criminal cases—occasionally a third. That means two out of ten are attending to the criminal branch, yet the criminal branch has 27,000 cases a year. Each of those two judges averages about 12,000 cases a year. Each of the remaining eight in the civil branch have on the average 2400 cases a year, and of the 2400 about 2100 relate to cases under \$300.00.

We are giving too much time to dollars, and too little time to human beings.

We take on the average two and a half to three minutes per case—I do not mean that more important matters do not take longer, but on the average as they pass through the courts. Of course the cases do not get an adequate amount of attention.

It has developed that the civil side has very adequate, first-class records. Those of the criminal side are very inadequate. It is almost complimentary to say that they have any records. I am referring to the Municipal Court.

In the Municipal Court we find grave abuses. We have what we call a system of "No Papering." "No Papering" refers to cases where there has been an arrest before an affidavit has been filed. The case, however, gets on the judges' docket and up to that time there is no affidavit. When it is called, the police prosecutor, if he wants to dispose of it, says, "No papers," and the judge lets it go at that, rarely saying anything, rarely making any inquiry.

We have the same abuse as to the *nolle* power. Technically, a case cannot be nolle without the consent of the court, but in practice, of course, the recommendation of the prosecuting attorney is always followed.

We have what seems to me an anomalous situation, called the "Motion in mitigation." In practice it works out this way: The court sentences a man; his attorney files a motion in mitigation; the judge reconsiders the case and often imposes a lighter sentence. The heavy sentence is sometimes seemingly imposed to please the public and the final sentence to please the defendant.

In the county prosecutor's office the situation is much better. Great murder trials and cases that the newspapers are interested in are carefully prepared and well tried. But the ordinary class of cases must be examined in order to determine how an office is being administered. The survey spent over \$10,000.00 for statistical work, examining and tabulating every one of the cases for 1919 and 1920 in the Common Pleas Court. In the Municipal Court we could not do this because they handle 27,000 cases a year. We took every tenth case, so we examined between 6,000 and 7,000 cases in that court. In the Common Pleas Court the situation is better, although the bench parole, the suspension of sentence and the nolling of cases are handled in rather a loose way.

Mr. Fosdick has found in connection with the police some things that are very startling. The army test was applied to our detectives. I assume we all believe that the detective force should be superior to any other branch of the police department, but they stood the lowest. As Mr. Fosdick said, it was not surprising that we did not catch more, but it was surprising that we caught any.

It may interest you to know, if you own a Packard automobile and live in Boston, the rate for insurance is half what it costs in Cleveland. There is, therefore, a commercial aspect to the crime problem; in other words, it costs money to administer criminal justice inefficiently.

Passing hurriedly along—as I see my time is rapidly expiring—I will say that you may wonder how the survey is being received. Well, taking the judges first, it is apparently a pleasanter occupation to judge others than it is to be judged. I find that I now understand what Mr. Dooley meant when he said that "The American judiciary are as fine a body of irritable and indignant gentlemen as can be found in the land." Some of the judges have not been good sportsmen.

There are three newspapers in Cleveland. I have represented one of them for twenty years. That one showed its impartiality by knocking us from the beginning. One thing that it printed was pretty good. It said: "An ounce of prevention is worth a Pound of Frankfurters." This paper was the only one that seemed critical. The last week there has been a radical change, and it has published some editorials commending us and speaking nicely of various things, and therefore I may now say that all newspapers are favoring the survey and giving us their support.

In conclusion let me say, as I view our situation, it is this: The evils might be said to be three: Newspapers which are sometimes yellow, some judges who are sometimes weak, and some lawyers who are sometimes money-mad. I think the only thing that will remedy these conditions is a strong, virile bar. I do not believe a mere voluntary association will accomplish the results. I think it must in some form or in some way be given a legal basis. There are 1400 lawyers in Cleveland. Eight hundred belong to the Bar Association. One hundred and ten of them have not paid their dues. One-half of the bar, therefore, is carrying the load. Although Mr. David and the county prosecutor and the executive committee of the Bar Association did wonders last spring, the money that was raised was raised out of one-quarter of the Cleveland Bar.

We must find some means by which we can finance the Bar Association and put it on a strong basis. Our budget is only \$7,200.00 a year; it ought to be \$30,000.00. We have one secretary, who is paid a salary and does nothing else. I want two. I want the secretary of the Cleveland Bar Association to get \$9,000.00 or \$10,000.00 a year. I want at least \$10,000.00 or \$12,000.00 in a fund to take care of prosecutions.

For many years I was one of the attorneys for the Prosecution Committee of the Credit Men's Association. We found that when we established the Fraudulent Failure Fund, the statistics demonstrated that people were not so apt to become crooked in bankruptcy.

I have thought of a very radical measure if no better plan can be adopted, that is, I would have the City of Cleveland place an occupation tax on lawyers and thereby raise \$25,000.00 to \$30,000.00 a year. This would make all lawyers

contribute. This fund to be administered by lawyers and to be expended to better the administration of justice. If such a plan were adopted, we could protect the public from crooked lawyers, the lawyers from tyrannical judges, and judges from the attacks of yellow newspapers.

I do not care what plan is adopted, but believe it is essential that the legal profession adopt some method that will increase respect for law, for the greatest evil now confronting us is disrespect for law.

We must remember that the success of the American idea of government is peculiarly dependent on respect for law, and that the worst undermining influence is the "highbrow lawbreaker."

It therefore behooves us to preach respect, to practice it, to teach it to our children until it becomes, as in ancient Sparta, a national instinct.

#### *Note*

The campaign card, used by one of the candidates in the recent election of a chief justice of the Municipal Court of Cleveland, produced by Mr. Thompson and referred to in the foregoing address, is here reproduced. We are informed that the candidate thus advertising himself was not chosen, and that Chief Justice Dempsey, also referred to in this address, was elected.

F. W. G.



MR. GREEN.—I think that the members of the Massachusetts Bar Association are deeply grateful to Mr. Thompson for coming so far in our honor to tell us of the conditions in Cleveland, of which we had had some slight knowledge, and for stating so clearly the steps that are being taken to meet them. I move, sir, that as an expression of our gratitude and our appreciation we give him a rising vote of thanks.

THE PRESIDENT.—We are fortunate in having with us to-night the chief law officer of the Commonwealth. Although the hour is late for such of us as propose to return by the train which leaves in about forty minutes, I think it would please you all to have him say a word to us if he will.

### REMARKS OF THE ATTORNEY GENERAL, HON. J. WESTON ALLEN

#### *Friends of the Massachusetts Bar Association:*

I have been trying to get here all day. Although I could not attend your meeting, I am very glad indeed that I was able to get away in time to hear the interesting and inspiring address to which we have just listened. I wish that all of the Massachusetts bar could have had the inspiration that has come to us from what the guest of honor has said.

It is with all humility that any attorney general of this Commonwealth speaks in the old city of New Bedford. It is a noble list of attorneys general which this Commonwealth can point to in the past, and there are no more honored names upon that roll than the names of Clifford and of Knowlton.

We are all deeply stirred by the recent decision of our Supreme Judicial Court, but I am speaking to you who are on the firing line with me. When a man is on the firing line it is no time to talk. In that decision, and as a result of that decision, the things that seem to me worth while are the things that perhaps are not first in our thoughts. The man would be unworthy who would regard the outcome of that decision as in any respect a personal matter, or would feel anything but regret over the downfall of a public official. But that decision means something more than the removal of an individual from office. It means that our highest court has stood for principle in this Commonwealth. And the by-

products, if I can call them by-products, of that decision are the effects that it has had and is going to have upon the bar and upon the people. I have been told by men who are large employers of labor in the State that among those who are working for them there is a feeling that since that opinion conditions are better for them and they appreciate more our courts and the protection of our courts. And I have been told that the younger members of our bar feel differently and their outlook has been broadened because of the masterly enunciation by our chief justice of the ethics of the profession.

While I have spoken of those results of the decision of our highest court as by-products, the thought that I wish to leave with you is that, after all, they are not by-products of the decision, but that they are the fundamentals which make that decision worth while. If the decision of our highest court did not receive substantially the universal verdict of approval of the people, I will not say it would not be worth while, but it would not be so much worth while. And if it leads the young men who have entered the bar and the young men who are about to enter the bar of Massachusetts to look to the profession not merely as a means of getting money, but as a means of honorable service, if it leads those young men who join our ranks, to listen to their oath of office and to take that oath of office meaningly and with a resolution that they will serve faithfully as officers of the court in accordance with that oath—then the decision of our great chief justice has come at a timely hour and a new landmark has been set up on the highway of justice to mark out anew the path of duty for those who lead and those that follow in the preservation of the State.



## SUGGESTIONS AS TO HEARINGS BEFORE MASTERS IN EQUITY.

### I.

There is general dissatisfaction with hearings by masters in suits in equity. The dissatisfaction is not only general but it is great.

### II.

There was some discussion of the matter (1) at a meeting of the Massachusetts Bar Association at Worcester in December, 1919, (reported in the Massachusetts Law Quarterly for February, 1920,) and (2) in the able and admirable report of the Judicature Commission to be found in the Special Number of the Massachusetts Law Quarterly published in January, 1921, pp. 76-85. On neither occasion was there an attempt to deal with the matter exhaustively. No more was attempted in the Judicature Commission's report than to state some defects and to throw out one or more suggestions which might be worthy of consideration. Having in mind the ground which had to be covered by their report the Commission could not have gone further. What I have to suggest here is in addition to what is suggested there and is the result of more mature consideration given to the matter since then.

### III.

The Commission suggested that it would be better if in the future the court should limit masters' hearings to taking accounts and deciding similar matters, stating (what is undoubtedly true) that that was the original function of special masters in equity. To that I should heartily agree if it were possible. But confining masters' hearings to that means having the merits of every suit in equity decided by the court. That cannot be done unless additional judges are appointed for both the Supreme Judicial and the Superior Courts. As to this the Commission said, at pp. 84-85: "We are clearly of opinion, however, as stated at the beginning of this dis-

cussion, that the number of judges should not be increased until more detailed information than we have now is collected and studied." It may be assumed that for obvious reasons there is not to be an increase in the number of judges of either court for many years to come.

Another suggestion thrown out by the Commission as worthy of consideration was the practice of having the master secure guidance from the court by way of a preliminary report in case a doubtful question of law arises in the course of the hearings before him. This suggestion is an excellent one and I shall have something to say as to it later on.

The third suggestion made by the Commission was: "The court might well consider some method of requiring periodical reports from masters or auditors of their action and the progress of the case. We believe that such practice would keep the court more closely in touch with the proceedings. We see no better method of overcoming the present easy-going practice, under which the convenience and agreements of counsel control the progress of the case to such an extent that the master or auditor is practically helpless."

I shall have something to say later on as to this suggestion also.

#### IV.

As matter of convenience the Judicature Commission considered the practice before masters and the practice before auditors as one matter. They have much in common and for the purposes which the Commission had in hand might well be dealt with as one subject. In one respect, however, they are quite different; an auditor's report is *prima facie* evidence only while the report of a master in cases where the rule to the master does not direct him to report all the evidence has the effect of a verdict or, speaking more accurately, the effect which a special verdict at common law had in an action at law. For my purposes it is more convenient to consider the practice before masters in equity by itself.

#### V.

The Judicature Commission has given it as their opinion (as I have already said) that if it were possible the best

thing to be done with respect to masters' hearings in suits in equity would be to stop sending cases to masters to be heard on the merits and to confine masters to their original function of settling accounts and deciding similar matters after the merits have been decided by the court. But that is out of the question. As I have already said, it cannot be done without increasing the number of judges of both courts, and additional judges will not be appointed for many years at least.

That being out of the question, that is to say, it being settled that the merits of many if not most suits in equity must be sent to a master for decision, the question I propose to discuss is: What can be done to better the administration of justice in this connection and remove the general dissatisfaction which now exists?

As matter of logic the answer to that question is plain. As matter of logic since the best thing possible would be to have the merits in all suits in equity decided by the court and since that cannot be done, the next best thing is to give the master when he is hearing a suit on the merits all the power and authority of a judge of the court, all the power and authority which a single justice has when sitting to hear an equity case on the merits.

I always distrust an argument which is purely logical. I therefore wish to consider whether this solution of the difficulty is a logical result merely or whether on a full consideration of the matter it is the best solution to be found. I believe that it is the best solution. I proceed to state my reasons for that conclusion.

## VI.

If you are going to give to the master when hearing a suit in equity on the merits the power and authority of a single justice the first thing to be done is to change the terms of the rule sending equity cases to masters to be heard on the merits. The terms of the rule now in use in nearly every case (in Suffolk County, at least,) are in substance: To hear the parties and their evidence and report his findings of fact to the court. The court can direct the master: To hear the suit on the merits and report to the court his findings of fact and his rulings of law including the terms of the decree which ought to be entered in the case.

Today the practice is almost universal to use the more limited rule in sending a suit to a master to be heard on the merits. It is in exceptional cases only that the broader rule is used. The practice of using the more limited rule is so universal that the very definition of special masters in equity has recently been said to be: "Officers appointed to hear the facts and report their findings to the court in equity cases." I am not sure that it is not the general assumption of the bar that that is of necessity the sole power that can be given to a special master in equity. Of course, that is not so. That that is not so is pointed out in *Cook v. Scheffreen*, 215 Mass. 444, 449.

My first suggestion is that the practice in this connection should be reversed and that the broader rule should be used ordinarily and the more limited one should be used in exceptional cases only.

## VII.

So far as I can learn the practice of using the more limited form of rule has never been the subject of careful discussion and mature consideration. It is a matter which has not been dealt with in the rules of the court and so far as I know has not been a matter of consultation among the judges. I cannot help thinking that the terms of the rule sending a suit in equity to a master to be heard on the merits is a matter which has never received due consideration.

## VIII.

What benefits will ensue if this change in the rule sending the case to the master is adopted?

The first and most obvious result will be to do away with the time now spent by the master in finding facts on alternative theories of the law governing the rights and liabilities of the parties to the suit. If the broader form of reference to the master is used the master will rule upon what the substantive law governing the suit is and find the facts in accordance with his ruling on that question. The finding of facts on alternative rulings of law will be wiped out *ex vi termini*.

Of course, if the court ultimately holds that the master was wrong in his ruling as to what the substantive law of the suit

is the case has to go back to him to find the facts under the decision of the court as to what the substantive law is. But would not that be better than the practice which now obtains of finding the facts on all the alternative theories as to what the law may be ultimately held to be?

But that is not the only alternative. There is the third course of action already referred to, namely: In case the master is in doubt as to what the substantive law is he could and should make a preliminary report and submit that question to the court.

Of course, this third course of action could be adopted in case the more limited rule to the master had been used. There is however this difference: In cases where the more limited rule to the master is used the master has to find the facts on all alternative theories of substantive law or send the parties to the court for a decision on that question. While in cases where the broader rule is used the master can decide what the substantive law is if he thinks there is no great doubt about it and make a preliminary report to secure further guidance from the court in the few exceptional cases only where the question of substantive law is in fact a difficult one.

There is one other respect also in which the course of trial is improved in case the broader rule of reference is used. It is more satisfactory to try a cause (whether it be an action at law or a suit in equity) as a whole first and take up the question of what the law is when it has been decided what the case is which has been made out in the evidence. It is as a general rule much more satisfactory to find out what the case is and then consider what the law governing that case is than to undertake in the first instance to find out what the law is and then see if the facts do or do not fit the law which has been passed upon before it is found out what the facts are; that is to say when the question of what the substantive law is is passed upon to some extent as an academic matter.

Whichever form of rule to the master is used the present practice of finding facts in the alternative should be abolished and the master should be given to understand that he ought in this and in all other matters to secure the judgment of the court under and by way of a preliminary report whenever in his opinion that is desirable in the trial of the suit which is referred to him.

## IX.

But what I have already said is not the only advantage that will ensue from adopting the broader rule and the adoption of the broader rule is not the only suggestion I have to make in order to do away with the present dissatisfaction in respect to hearings before masters in equity.

I can (I think) best lead up to the further suggestions I have to make by describing the present practice in sending a case to a master and the travel of the case after it has been committed to the master's hands.

Under the practice as it obtains today counsel assume that every suit in equity is to be sent to a master in case the pleadings result in an issue of fact. In a case where the pleadings end in an issue of fact counsel attend in court, tell the single justice sitting in equity of the fact that there is the suit in question, that it has resulted in an issue of fact, and state to the court that they have or have not agreed upon the person who is to be appointed master in the cause. If the judge finds that it is not practical for the court to hear the case on the merits and counsel have agreed on the master he is appointed. If they have not agreed upon the master he is chosen by the judge. In either case the limited form of rule is used as a matter of course. Having got the case before the master counsel ordinarily sit back and take an assignment for a hearing when nothing much else is doing in their respective offices and when it is convenient for their respective clients and their principal witnesses to go on with a hearing or hearings. After hearings have begun postponements and new assignments are made on the same basis. Possibly this is an exaggeration. But however that may be one thing is certain: As hearings before masters are conducted today the master is helpless in pushing the hearings and in pretty much every respect. In case he thinks the case is not being properly pushed he cannot set it down for a hearing; and it is not possible for him to refuse to postpone if parties agree to postpone; and when the matter of assignments or postponements is under consideration the convenience of the master is the convenience last considered. If he is not ready to go on when counsel and parties wish and not go on when they do not wish he is not likely to be agreed upon as a master in future cases.

As things go now a master is a sort of fact-finding slot-machine set in motion when counsel, parties and witnesses find it convenient to set him in motion, and when set in motion he is bound to find the facts on any and every issue which the parties request. Possibly again this may be in some respects an exaggeration. But however that may be this is true: The master is not and cannot be the dominating power in the matter and try the case as a judge tries the cases tried by him. A judge can and often does shorten the hearings before him by suggesting that for the present at least counsel need not go further in respect to an issue of fact or a rule of law; a master sitting under the more limited form of rule is not expected to do that and as a matter of fact he does not do that. A judge will try in one day a case which will take two or three days at least before a master. One reason for this is the matter I have just referred to, namely, as matters go today the master is not and cannot be the dominant power and cannot direct the trial as the magistrate trying the case (whether judge or master) ought to be and do.

When I say that a judge will try a case in one day which it will take a master two or three days to try I do not mean that masters do not do their work well. I think that they do. What I mean is that the same man sitting as a judge can try a case in one day which it would take him sitting as a master two or three days to try. The trouble is not with the men but with the system.

## X.

The next change which I have to suggest is that the court in issuing the rule to the master should specify the day on which the hearings before the master are to begin and also should provide that the hearings should go on from day to day until the evidence is closed.

The delays which today are incident to a suit in equity being heard on the merits by a master constitute one of the greatest causes of the general dissatisfaction with masters' hearings. Can a better way be devised for ending these delays than by having the day when the hearings are to begin fixed in the rule sending the case to the master and by having it provided in the rule that the hearings shall go on from day to day until the evidence is closed?

Of course, the court cannot fix the day when the hearings before the master are to begin and provide that the hearings shall go on from day to day unless a protective order is issued in every case in which those provisions are made in the rule. \*

The changes which I have just suggested, namely: That (1) the rule to the master should specify the day on which the hearings are to begin, and (2) that the rule should provide that the hearings should go on from day to day until the evidence is closed, and (3) that a protective order should issue as a matter of course in every case are so revolutionary that at first blush the adoption of them may seem to be going too far. But if you consider the matter for a moment, is it going too far? Without question delays in hearings before masters will come to an end if these suggestions are adopted. What reason is there why they should not be adopted? We are all agreed that we should have the best administration of justice that can be had in this connection if all suits in equity were heard on the merits by the court and not by a master. If all suits in equity were heard on the merits by the court the standing which the protective order gives to the case in hearings before a master would result *ex vi termini*. The only matter which the suggestions I have made adds to what would ensue if all suits in equity were heard on the merits by the court is that a special assignment is made in the rule to the master for the beginning of the hearings. Having in mind the present practice as to getting an assignment before a master I think that that addition ought to be made to what would ensue if suits in equity on the merits were heard by the court.

If it is provided in the rule sending the case to the master that hearings shall begin on a day specified in the rule and shall go on from day to day, no postponement can be had without a subsequent order of the court. This follows as a matter of course. I think that is an advantage and not a disadvantage. It is necessary to break up the practice now firmly rooted of masters' hearings being postponed whenever either party finds that to be convenient.

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\* There seems to be some confusion of thought upon the nature of a protective order. A protective order does not provide that while engaged before the master counsel shall be excused from going on in other courts. No court could or would issue such an order. No court would or could undertake to control the trial lists of other courts. What a protective order does is to give to hearings before the master the standing of a trial in the court which issues the protective order.



I have not been able to think of a better way of wiping out the delays in hearings before masters. I do not think that any disadvantages will ensue if the way which I have suggested is adopted. Possibly I may be wrong. The suggestion at any rate is one worthy of consideration and this consideration will without doubt produce a better way of getting rid of the delays now incident to masters' hearings if a better way can be found.

## XI.

If the suggestions which I have made are adopted I do not think that anything further need be done to secure the wiping out of delays in the trial of suits in equity by masters.

But if this be not so or if these suggestions are not found worthy of adoption there is another way of securing promptness in that matter. That is to have masters make periodical reports (say twice a year) of what has been done in the cases pending before them, to be followed by a calling of the docket of those cases within say two weeks after the day when the master's report is due. At the calling of the docket the court could in its discretion dismiss the bill without prejudice if the plaintiff has been in default or direct hearings to go on at a day fixed, whether the defendant is present or not if it is the defendant who has been in default.

## XII.

Following out the suggestion that the way in which to do away with the present dissatisfaction with masters' hearings is to give to masters the power and authority of a judge, I come to the matter of a stenographer. One reason why a judge can try a case in a third or a half of the time in which it can be tried by a master is that when it is tried by a judge the evidence is taken by a stenographer. When the evidence is taken by a stenographer the magistrate trying the case (whether he be judge or master) can concentrate his mental strength, and the whole of it, on realizing what the evidence is as it goes in and what its bearing is on the issues of the cause in a way that it is not possible for him to do if he has to devote some of his strength to formulating notes of the evidence and writing them out in longhand. The ideal way

of trying a case is for the judge to devote his mind to taking in what the evidence is as it goes in and what its bearing is upon the issues, and never taking a note of what the evidence is. I do not mean that he ought not as the trial goes on to make a list of the witnesses, a list of the affidavits and a chronological statement of the facts in the case. But I do mean that he never ought to take a note of what the evidence is. I believe that no magistrate (be he judge or master) can try a case well if he undertakes to take notes of the evidence in addition to understanding what the evidence as it goes in is and what its bearing on the issues really is.

A good arrangement (if it could be made) would be to let the county pay the expense of having the evidence taken down in shorthand, coupled with an agreement by the parties that they would have so much of the evidence written out as the judge should ask for, the expense of writing out this copy of the evidence to be shared or taxed in costs and so paid for by the losing party.

If that arrangement were made and the other suggestions which I have put forward were adopted I believe that there would be a saving of money both for the county and for the parties. Money would be saved by the county because the master would try the case as quickly as a judge would, that is to say in a third to a half of the time which is now taken by masters under the present system. The result would be that with fifteen dollars a day for taking down the evidence added to the master's compensation the county would pay less than is now paid for the master who takes down the evidence in longhand. And money would be saved by the parties because the expense of writing out one copy of the evidence to be shared or taxed in costs would be less because the fee paid by the party to his counsel would be less since the case would be tried in one-third to one-half the time.

This arrangement could not be made without further legislation. The power of the Supreme Judicial and the Superior Courts today is limited to directing the county in question to pay to masters reasonable compensation "for duties performed under the direction of the courts." Gen. Laws, c. 221, §55. To make the suggested arrangement possible this statute would have to be amended so as to authorize the courts to direct the payment of reasonable compensation to stenographers

in hearings before masters when the employment of them is specially authorized by the court.

### XIII.

When I determined to make some suggestions as to hearings before masters in equity I expected to include among them a recommendation that the rule sending the case to the master should provide that the issues on which the trial before him was to be had should be settled by him before the hearings began in the way in which the issues are now settled in all cases before the Supreme Court in England.

Speaking of this practice the Judicature Commission said: "It has been said upon the best authority, and it is generally agreed by those who have applied, or observed, the practice in the English and some of the Canadian courts, that one of the most effective methods of despatching business and avoiding unnecessary waste of time, money and effort in the trial and hearing of cases is the system of preliminary examination of parties or their counsel, either before the court or before an official master to ascertain definitely what are the actual points of dispute between the parties and what questions are undisputed, so that the real issues in the action may be ascertained in advance and the trial directed to the decision of those issues."

I then thought this to be true. Since then I have made a study of the matter and am more than convinced of the truth and accuracy of this statement. At that time I was inclined to the belief that this improvement in the administration of justice could be tried out and the bar become familiarized with it by its adoption in masters' hearings. I was inclined to think that this could be done without legislation because that was the view which the Judicature Commission was inclined to take. Speaking of the practice of having the issues settled by the court before the trial begins the Judicature Commission said: "No legislation is probably needed in regard to defining issues at present at least. If a closer study of the inherent functions of the courts and the existing rule-making power should develop the need of legislation the matter can be brought up later. We think that the court has sufficient power now to act by rule upon this matter." (p. 113.)

But a study of the matter which I have since made has led me to the conclusion that this change in the trial of causes cannot be made without legislation.

This is not the place to go into this matter. I am making suggestions as to bettering practice in masters' hearings and what I have written is already too long. I propose, however, to add a short statement of my reasons for thinking that the court cannot adopt the English practice without further legislation. In order that it may be as short as possible I shall not fortify my statements by authorities. Rosenbaum's Rule Making Authority contains an admirable description of the practice and is fortified by abundant citations of authority.

The English practice of having the issues defined and settled by the court before trial, originated in a desire to abolish pleadings and it has had that effect. At common law the issues (both in actions at law and in suits in equity) are left to be defined and settled by the parties. This was and is done by the parties in their pleadings. But under the practice which obtains today in England and in jurisdictions which have followed the English practice, the issues on which the cause is to be tried are settled not by the parties but by the court after conference between the court and the parties. The parties attend before the court and on questions asked by the court and on statements made by counsel the court decides what facts are not in dispute and what facts are in dispute. An order is then made settling the issues on which the cause is to be tried. As a matter of fact, in order to make the order efficient the court at that time deals with discovery (of documents or of other evidence) with admissions of facts and particulars of claims. But those matters are incidental; they do not give character to the proceedings. The proceeding has brought about a fundamental change in the determination of what the issues are on which the cause is to be tried. The court now performs the function which pleadings heretofore performed. In other words the function performed by pleadings is abolished. The whole system of having the issues determined by the parties is abolished, and for that system the new system is substituted of having the issues settled by the court.

Such a change in procedure (it seems to me) is not within the rule-making power of Massachusetts courts. The authority

given to the Supreme Judicial and the Superior Courts is to make rules "not inconsistent with law."

The Practice Act (Gen. Laws, c. 231) assumes if it does not prescribe that in actions at law the issues are to be determined by the parties in their pleadings. Here is a "law" which prescribes that the issues in an action at law are to be determined by the parties. Since Massachusetts courts are limited to making rules "not inconsistent with law" these courts cannot adopt the English practice of having the issues determined by the court and not by the parties, so far as actions at law are concerned at any rate.

There is no Practice Act or other statute with respect to the trial of suits in equity. But the change from the common law system of having the issues determined by the parties in their pleadings to the English practice of having them determined by the court is so revolutionary that it seems to me that in suits in equity also it is not within the rule-making power of Massachusetts courts to make the change.

In England this change was brought about by rule. But the rule-making power in England is an entirely different thing from the rule-making power in Massachusetts. It is provided in the Judicature Act of 1873 (36 and 37 Vict. c. 66, §23) that "The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeals respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act or by such Rules and Orders of Court as may be made pursuant to this Act." And by the Judicature Act of 1875 (38 and 39 Vict. c. 77, §17) that rules of court may be made "for regulating the pleading, practice and procedure in the High Court of Justice and Court of Appeal, and, generally, for regulating any matters relating to the practice and procedure of said courts respectively."

In addition in England the rules after they are made have to be submitted to both houses of Parliament and if not disallowed by order of the Privy Council upon an address by either house stand as made. Rules in England therefore have the effect of Acts of Parliament.\* A study of the changes

\* It may be worth while to point out that the practice of having the issues determined by the court under a preliminary reference was not introduced in New Jersey by rule, but by statute. See N. J. St. 1912, c. 231, §32, taken in connection with Schedule A.V., annexed to that act. (See V. Preliminary References.)

made by rule in England leads to the result just stated. These changes may be found set forth in Rosenbaum's Rule Making Authority.

#### XIV.

To put my suggestions into a practical form I add the terms of the rule which I think ought to be adopted. I suggest that they be as follows:

"This case came on to be heard on motion of the plaintiff that it be referred to a master and thereupon, upon consideration thereof: It is ordered that the above-entitled case be referred to John Doe, Esq., as master, to hear the case upon the merits and to report to the court his findings of fact and his rulings of law including the terms of the decree which ought to be entered in the case. The master is ordered to report so much of the evidence as may be necessary to present any questions of law raised before him. Hearings before the master shall begin on the ——— day of ——— 192— and shall proceed from day to day until the evidence is closed. It is further ordered that engagements of counsel and of the master in hearings before the master in this case shall be of the same force and effect as an engagement in open court but only upon days when trial actually proceeds before the master. The master is directed to secure by way of preliminary report further instructions from the court whenever in his discretion he thinks they ought to be given. Leave is given to the parties to apply.

By the Court,

CLERK."

The provision in the rule directing the master to secure further instructions whenever he thinks that they ought to be given ought not to be necessary. I suggest that it be inserted because of the prevalent belief and practice that such action by the master is not desired.

The clause giving parties leave to apply ought not to be necessary. But it seems to me to be desirable in view of the present understanding and practice. It is not intended to imply that the terms of the rule to the master are to be

changed on subsequent application by the parties or one of them. The terms of the rule to the master should be settled when the rule issues. Further application by the parties should be restricted to exceptional matters which did not exist or could not be anticipated when the rule was made. For example in case the master should refuse to secure from the court further instructions on a point it ought to be open to the parties or either of them to apply.

WILLIAM CALEB LORING.

BOSTON, December 17, 1921.

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*Note.*

In a discussion of the foregoing suggestions since this article was sent to the editor, it was suggested by an experienced practitioner that the proposed rule should also contain a clause allowing the master to adjourn the hearing for not more than three days without an application to the Court for a special order.

F. W. G.

## SUGGESTIONS AS TO CRIMINAL LAW AND PRACTICE.

ANDOVER, MASSACHUSETTS, NOVEMBER 21ST, 1921.

*Editor Massachusetts Law Quarterly:*

DEAR SIR:

It appears to me that the Massachusetts Law Quarterly is the most available way of reaching the profession. I have therefore put down some matters with regard to the criminal law which seem to me to need attention and submit them to you as the editor. I have the chapter and section for all the statements but it did not seem to me useful to include them.

Yours very truly,

CHARLES U. BELL.

It seems to me that both our criminal law and our criminal practice need revision.

The penalties for breaking the law as stated in the General Laws have no common standard. The easiest illustration is the relation between imprisonment and fine. In most cases where imprisonment may be imposed, a fine is an alternative punishment. It is usually in the words, "Three months imprisonment or a fine of \$50.00." Even where the statute imposes fine and imprisonment, a general provision allows the court to impose one only if there has been no previous offence. It would seem as if there would be some fixed relation between them. For instance a one hundred dollar fine might go with one month's imprisonment. This appears to have been recognized by the provision that a person committed for nonpayment of a fine should be discharged after eight days if the fine was five dollars, after twenty days if it was from five to ten dollars and after thirty days if the fine was from ten to twenty dollars. This is now changed to an allowance of fifty cents for each day's imprisonment. (G. L. c. 127, § 144.) Accepting this standard a month's imprisonment should be equivalent to \$15.00, or three months to \$45.00, or for six months to \$90.00. But in fact in the G. L. the fine



given with six months' imprisonment varies from \$20.00 to \$5,000.00 and between those sums, \$50.00, \$100.00, \$200.00, \$300.00, \$500.00, \$1,000.00. In one case it is \$1.00 to \$25.00. So in case of imprisonment for one year the fine named varies, \$100.00, \$200.00, \$250.00, \$300.00, \$500.00, \$1,000.00, \$2,000.00, \$5,000.00. There might possibly be some reason for this variation, founded on the class of crime or the person most likely to commit it. I can find nothing indicating any such reasons.

There are different penalties imposed for similar crimes. For instance, in G. L. c. 268, sections 28 and 31 both refer to giving articles to prisoners, and are substantially identical, but the penalty in §28 is \$50.00 or two months, while under §31 it is \$500.00 or three years in the State prison. The acceptance of a bribe by a public officer is punished in c. 68, §8, \$5,000.00 or ten years, by a juror, §14, five years or \$1,000.00, by a sheriff, etc., §37, three months or \$300.00. There are several other cases of the same kind.

G. L. c. 123, §§ 110, 111, 112 each end with the words "shall be punished by fine or imprisonment at the discretion of the court." Also c. 207, § 52, c. 126, § 7, and c. 84, § 22 impose a fine at the discretion of the court.

Coming to less important matters. There is a quite frequent use of the word "forfeit." But in the criminal law the word is nearly equivalent to fine. The court says in *O'Connell v. O'Leary*, 145 Mass. 30: "Forfeiture, that is, punishment for an offence, not indemnity for a civil wrong." See *E. S. Parks Shellac Co. v. Harris*, 237 Mass. 312, 318.

The statutes recognize this. In G. L. c. 280, §1, it is provided, "Fines and forfeitures exacted as punishment for offences or violation or neglect of any duty imposed by statute . . . may be prosecuted for and recovered by indictment or complaint or by an action of tort." In the G. L. I can discover no rule in the use of the words "fine" and "forfeiture." Practically the same offence in one section is punished by a fine and in another section, in the same chapter, by a forfeiture. In many cases of forfeiture nothing is added as to the mode of collection and that falls under the general provision which I have quoted. In one case it is provided that it shall be collected by an action of contract, probably because at common law forfeitures were sued for

in an action of debt. In many more it is provided that it shall be collected by an action of tort, an entirely unnecessary provision being covered by the general provision. In several cases it is provided that the forfeiture shall be recovered by an information in equity brought by the Attorney General before the Supreme Judicial Court. The person who drew the law was apparently ignorant of the distinction between an information in equity, which is one form of a bill in equity, and an information at common law which is a criminal proceeding.

"An information is in its nature a prosecution for some offence against the government by an application to a court of criminal jurisdiction and is essentially a public criminal prosecution." *Goddard v. Smithett*, 3 Gray, 116, 121.

In a few cases there is provision for an injunction to follow. But an injunction may issue sometimes even in a criminal case. Even trial justices are named among the magistrates who may issue injunctions. (G. L. c. 220, § 2.)

Why might not all these minor offences omit to name the punishment when it would fall under the general provision in G. L. 279, § 5, which is as old as 1782: "If no punishment for a crime is provided by statute, the court shall impose such sentence according to the nature of the crime as conforms to the common usage and practice of the Commonwealth."

There are numerous cases where the punishment is stated to be a number of years in the state prison or one year in the house of correction. As the shortest term in the state prison must be two years and a half, this leaves a gap. If the magistrate should think that the punishment should be two years, he cannot impose it, but must give more in the state prison or less in the house of correction.

The criminal sections are scattered through the whole General Laws, the first being c. 1, § 10, and the last, c. 280, §§ 11, 12.

The administration of the law also needs reformation. There are certain defects which it seems impossible to cure. So long as there are nearly two hundred and fifty persons in the Commonwealth who may impose criminal sentences, uniformity, however desirable, is impossible.

There are other points in which improvement seems pos-

sible. I take the following figures from the Report of the Bureau of Prisons, 1920, for the year 1919. The total arrests were 160,392. The cases begun before the lower courts were 155,068. These were disposed of as follows:

Discharge before arraignment (drunkenness)	49,241
Found not guilty.....	6,400
Nol pros before trial, etc.....	5,744
Remaining before the court.....	93,683
	<hr/>
	155,068

Apparently two-fifths of the arrests need not have been made. Then following the 93,683 cases dealt with by the court, the result is as follows:

Bound over to the Superior Court.....	2,931
Sentenced .....	52,941
	<hr/>
	55,872

Of these sentences, 9,908 were suspended. What became of the other 37,811 I do not discover. There were findings of guilty, including pleas, of 79,614. Turning to the Superior Court, there were original cases.

Pending from the previous year.....	2,198
Begun .....	4,790
	<hr/>
	6,988

These were disposed of as follows:

No bills, not guilty, disagreements.....	667
Nol pros.....	432
On file before trial.....	950
Sentenced .....	919
On file after trial.....	555
Probation .....	778
Pending for sentence.....	525
Untried .....	1,998
Defaults .....	99

The figures on the cases appealed to the Superior Court were:

Pending from 1918.....	2,432
New cases.....	6,796
	<hr/>
	9,228
Convicted or plea of guilty.....	4,069
Sentenced .....	1,568
Pending for sentence.....	877
Carried to next year.....	2,232

Summing up these figures:

	Original		Appeal	
Nol pros, on file, etc....	1,937	29%	3,453	37%
Sentenced .....	919	13%	1,568	17%
Probation .....	778	12%	1,089	12%
Trials .....	407	6.6%	365	4%

The inferences to be drawn from these figures are doubtful except this, that the chances that a person arrested will be sentenced are quite small. The deterrent effect of our criminal law is thereby greatly lessened.

But I wish to go a step further. If a person is sentenced, what then? I find no figures which apply to the causes of discharge from the houses of correction. At the state prison the figures were:

Received under sentence.....	134
revocation of parol or permit.....	21
Returned from other institutions.....	22
	<hr/>
	177
Discharged by expiration of sentence.....	29
pardon .....	2
death .....	13
parol .....	83
Removed to other institutions.....	69
	<hr/>
	196

The population of the state prison was slightly reduced during the year. About 15% of the prisoners served out their terms. The belief is that in the houses of correction it is even smaller. One effect is this: Neither the sentence stated in the Statutes nor the sentence imposed by the court bears any very real relation to what the convict actually suffers. That is determined by other boards and officials. One evil is that it is determined not in open court but privately. The practice and the theory expressed in the statutes have parted company. They ought to be reconciled.

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*Note.*

The foregoing discussion was submitted by the editor to one familiar with our prison system, who added the following information:

"The surprise with which some of Judge Bell's figures will be read, shows the difficulty we have in realizing the great changes there have been in methods of dealing with crime. For example:—He shows that 49,241 persons arrested for drunkenness were 'released without arraignment.' A few years ago, the phrase would have been unintelligible. Even now, some do not know that the law authorizes the release from the police station of a man known not to be an habitual offender, saving him from exposure in court and a record, and enabling him to keep his work.

"He tells us of the peculiarities of the laws about fines, their collection, etc. Here, too, there has been a great change. Formerly there was little effort to collect fines. In most cases it would have been useless. Commonly, a man was imprisoned for a brief term at the public expense, and released without paying his debt. Now, in thousands of cases, he is put on probation on condition that he pay his fine. In 1920, nearly \$70,000 was collected from this source.

"One of the most remarkable facts revealed by Judge Bell's figures is that but two men were pardoned from the State Prison in 1919. A few years ago, the average was 27. An improvement? Yes: 'A pardon not merely releases the offender from the punishment, but obliterates, in a legal contemplation, the offence itself.' (16 Wallace, 151.) A guilty man has no claim to it. Under the new Massachusetts method, he does not get it. But guilty men are paroled—allowed to serve a part of their sentence outside the prison walls, under supervision and control; supporting themselves—released, but *not discharged*. They serve out their full sentences, in custody, but not in prison."

**THE LEGISLATIVE HISTORY OF A "STATE PRISON"  
SENTENCE AS A TEST OF "FELONY" AND "INFAMOUS PUNISHMENT," AND THE PRACTICAL  
RESULTS IN MASSACHUSETTS.\***

One of the most important functions of the superior court is that of selecting the lawbreakers upon whom "infamous punishment" may be imposed. As the consequences are very serious, the processes are hedged about on every hand, lest an error should be made. 115,826 persons were arrested in the State in 1920—nearly 109,000 of them men. From these men the judges of the municipal, police and district courts made a list of eligibles for "infamous punishment," that is, for imprisonment in the state prison. They did not adjudge them guilty of the offences of which they were accused by the police, but passed them along to the superior court on the ground that there was "probable cause" to believe they were guilty.

The statistics of the courts are not classified by sex, but the number of women charged with felony is so small as not to affect the total materially.

Of the nearly 116,000 who were arrested, all but 11,619 had their cases disposed of in the lower courts. 6,775 appealed, and 4,844 others were bound over to the superior court, in most cases because their offences were so serious that the lower courts could not or would not take jurisdiction. This article deals only with these 4,844 cases.

When the lists of those bound over reached the several district attorneys, they examined each case carefully, and presented them to the grand jury. In 403 cases the grand jury differed from the judges of the lower courts, being unable to find evidence enough to warrant indictments, and reported "no bills." They did, however, find indictments against 2,924.

At some point in the proceedings, the district attorneys dropped 404 cases—*nol pros'd* them. 1,361 cases were also laid on file, before trial. The total of these dispositions of cases is larger than the number which came from the lower courts, because the cases considered included some from the previous year.

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\*As to the constitutional history of the grand jury and its relation to the term "infamous punishment," see *Massachusetts Law Quarterly*, August, 1921, p. 214.

The next step was to arraign the indicted. That the machinery used in the previous processes had done comparatively little injustice, is proved by the fact that 1916 of the indicted pleaded guilty and 46 others pleaded "nolo".

The last of the sifting processes was the trial of contested cases—of those who denied their guilt and demanded that the government prove it to the satisfaction of a jury.

Only 383 of the nearly 5,000 made this demand. Only 208 of them were convicted, and only 98 of those were sentenced to the state prison. It will be remembered that the grand juries had thrown out 403 cases of men who had been bound over by the lower courts. Traverse juries threw out 165 more, by verdicts of not guilty. In all, the government failed in 568 of the cases sent up by the lower courts, although, after the binding over, it had opportunity for finding evidence in addition to that presented below.

Then followed the final process—the disposition of the cases. First, 693 of those convicted (on their own pleas or by juries) had their cases laid on file. This in addition to 1,361 laid on file before trial. Next, 804 were put on probation.

Finally, only 759 were sentenced, of nearly 5,000 whose cases were begun. 114 were sentenced to the reformatory, 10 to the reformatory for women and 9 to the state farm. Of the others, some were sent to county prisons, and some paid fines.

Only 98 of the 4,844 who had been eligible to state prison sentences were sent to that institution.

To these facts should be added a statement which will interest taxpayers as well as lawyers—that the expenditures for criminal costs in the superior court last year were \$569,912.09! Suffolk County alone paid \$44,201.72, merely for jurors! The expenditures for grand juries are not separable from those of traverse jurors; nor are the costs of appealed cases separable from those of grand jury cases, but grand juries considered 3,327 cases, while only 789 cases, of both classes, were tried by juries. A substitution of informations for indictments, if only in the 1,962 cases in which the defendants pleaded guilty or "nolo" would result in enormous saving.

Such a change would also greatly reduce the jail popula-

tion. The average number of prisoners confined in the jails, awaiting trial, is about 300—about one-fifth of the county prison population. A large proportion of these are held for the grand jury. With rare exceptions they will plead guilty, when they have the opportunity, but they cannot plead until they have been indicted. Substitution of informations for indictments for those who wish to plead guilty would hasten the disposal of their cases, reduce the cost of proceedings and abate the very serious evils accompanying the detention of men in idleness while awaiting trial.

These figures are presented, not as a criticism of the action of the court, but that we may have some idea of the cumbersome, clumsy and enormously wasteful system under which we deal with crime, a system which compelled the consideration of 4,844 cases by grand juries, that the 98 who deserved state prison sentences might be discovered.

How could such a system have come into existence? The story of its origin and development is an interesting one, essential to an intelligent consideration of its modification.

When Massachusetts became a state, in 1780, it took over, by special provision of the constitution, all the laws previously adopted by the province or colony. These included some penal laws, and provisions for the punishment of their violation. The English common law offences were also recognized. They included a few serious crimes, designated as "felonies." Authorities differ as to the number, but there were not more than fifteen. In England they were all punishable by death or by forfeiture of estate. The arbitrary administration of these laws by England had been attended by great cruelty and injustice. To make these forever impossible, the framers of our constitution inserted a provision that the legislature "shall not make any law that shall subject any person to a capital or infamous punishment, without trial by jury." The courts of summary jurisdiction were allowed to initiate proceedings in felony cases and if in their judgment there was a probability of guilt, might bind over to the higher courts.

Several colonies became states in 1776 and 1777. As a rule, each of their bills of rights contained an article defining and establishing the rights of persons accused of crime—to guard them from judicial wrongs and secure for them fair trials. Special attention was given to the interests of those



who were charged with the more heinous offences, usually spoken of as "infamous crimes." Details of criminal procedure were fixed, and restrictions and obligations were imposed upon the courts in the exercise of their powers. But when Massachusetts became a state, it took a very different view. It did not recognize any *crime* as "infamous." It was interested to protect its citizens from "infamous punishments." It put its restraints, not upon the courts, by a regulation of criminal procedure, but upon the lawmakers. Other states classified crimes. Massachusetts classified punishments. No matter what a man's crime might be, the legislature should not make any laws providing for his infamous punishment without a jury trial. This distinction between the punishment of an "infamous crime" and the infamous punishment of a crime must be kept in mind in all discussions of this subject. (The federal constitution speaks of infamous "crimes.")

The phrase used in most of the early constitutions spoke of capital or "otherwise" infamous crimes, putting the two classes of crimes on the same level. That of Massachusetts omits the "or otherwise" so that it distinguishes between the two classes—the "capital" and the "infamous," and protects the accused in both cases. (The federal constitution uses the words "or otherwise," and speaks of "crimes" instead of "punishments.")

Just what was an "infamous" punishment, as distinguished from a "capital punishment," was not defined for many years, but it was popularly supposed to be life imprisonment, and possibly other very long terms. Several of the common law crimes punishable by death had been made statutory offences by the colony. The list of English felonies had been shortened from two hundred and more to about a dozen, before Massachusetts became a state.

In 1785 the state revived an old colonial law which provided for spectacular punishments—making the convict stand on the gallows in public, with a rope around his neck; making him stand in a pillory, cropping one ear, branding, etc. They were disgraceful and ignominious, but hardly "infamous," for the law of 1812 (Ch. 134) authorizing imprisonment as a substitute for them, distinctly said that they had been used as punishment for crimes "and misdemeanors" and not for

felonies only. Undoubtedly, in many cases, they were administered summarily, rather than after indictment.

It must be remembered that for the first twenty-five years of statehood, the common jail was the only place of imprisonment. Originally it was not a place of punishment for felons, but only a place of detention for persons who were waiting trial and execution. As a matter of convenience, because there was no other place, it was sometimes used for punishment, even for the execution of a few long sentences, but no "infamy" was attached to other punishments than hanging, which was the penalty for several crimes, and always carried out in the jail.

In 1785 the state made a new experiment in the treatment of offenders. The jails were not buildings in which convicted prisoners could be kept securely, and there were frequent escapes. To prevent this, a law was passed providing that all prisoners who had been sentenced to solitary confinement and hard labor should be sent to Castle Island, a military post in Boston harbor, "under the discipline and command of the officers of the garrison there." It was further provided that "to the end that such convicts should be fully known, and to prevent any person from purchasing their clothing, those who had sentences of twelve months or more should be provided with 'a coat, jacket, and breeches, as a badge of infamy, each of which should be made, half of cloth of one color and the other half of cloth of another color.' " As the parti-colored clothes were worn only while the prisoner remained in the prison, the "infamy" attending the wearing of the "badge" was only temporary, unless he escaped, when it would promote his capture.

Confinement at this military post was not successful, and a new method of preventing escapes was devised, the building of a state prison, of strong, massive masonry, with heavily grated doors and windows, etc.

The law in regard to the construction of the state prison buildings contained a remarkable provision. The agents who were to build them were "directed" to "construct the rooms of such dimensions and in such situations as will, in their judgment, be adapted to the purposes of safe confinement and penitentiary reformation." So far as I know, this is the earliest statutory coupling of "penitence" and "reformation"

with "imprisonment". We may well be proud of the fact that as early as 1803, Massachusetts broke away from the old theory that the sole purpose of imprisonment was punishment, for a past act. Recognizing the greater importance of a prisoner's future, it gave his reformation an equal place in plans for penal treatment.

The statute merely gave directions regarding the construction of the buildings, but the purpose embodied in it was made the permanent policy of the Commonwealth when, in the revision of 1836, it was declared that "The state prison shall be the general penitentiary and prison of the Commonwealth, for the reformation as well as punishment of male offenders." This language was repeated in the succeeding revisions of 1860 and 1882.

In the revision of 1902 the words "for the reformation as well as punishment of offenders" were omitted. Since that time neither punishment nor reformation has been the declared purpose of the state in imprisonment. The statute in its latest form (G. L., c. 125, §11) says:

"The state prison shall be the general penitentiary and prison of the Commonwealth, where all male persons convicted of crime in a court of the Commonwealth, or in any court of the United States, and sentenced by them according to law to solitary imprisonment and confinement in the state prison at hard labor shall be securely confined and employed at hard labor,"—a very clumsy statement of a self-evident proposition.

The state prison of today has little resemblance to that of the early days, as described by the supreme court in 1857. It said:

"The convict is placed in a public place of imprisonment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food and to severe discipline."

All this has passed away. The prison is still a "public place of imprisonment," and is "common to the entire state," but this does not distinguish it, for the same is true of the reformatory at Concord and the state farm, both state institutions, and sentences to solitary imprisonment and confinement at hard labor are now executed in houses of correction, as in the

state prison. The hair of an inmate of the state prison is not cropped, and he is not clothed in conspicuous prison dress.

Not one of the features which in 1857 distinguished the state prison from other penal institutions remains. The treatment of its inmates differs in no respect from that in the reformatory or in the jails and houses of correction.

In fact the state has made imprisonment in the state prison distinctly less penal than that in the jails and houses of correction. In its labor, one of its main purposes is to prepare a prisoner for free life, and its schools and its provisions for moral and religious instruction are far better than those of the jails and houses of correction.

The method of release is based upon the expectation that the lawbreaker will reform. When a prisoner is committed, he is told that he may earn the right to be released after the expiration of two-thirds of his minimum sentence, and when he is released, the state finds him employment and gives him friendly, helpful supervision. All this is inconsistent with the old theory that imprisonment in the state prison is the "infamous punishment" from which the constitution so carefully guarded an offender. It is inconceivable that under one of its statutes the state should attach life-long "infamy" to one of its citizens, to make him an outcast, and under others, at great expense, prepare him for good citizenship, release him before the expiration of his sentence and as far as possible reinstate him in the community, socially and industrially.

The constitution permits infamous punishments, but does not require them. Whether there shall or shall not be any such punishments is left wholly to the legislature, which can do away with them, either by changing the penalties for specific crimes, or the character of the punishment. It has done both. It has abolished the death penalty for several crimes, and it has so changed its penal system that no infamy attaches to imprisonment. To a large extent it has ceased doing things *to* offenders, and is doing things *for* them.

The court said in 1857, that "unless imprisonment in the state prison is infamous, there is no infamous punishment, other than capital." Today, any court which knows the state prison would say, "There is no infamous punishment, other than capital." This is not because it has lowered its

high standards of life, but because it has new standards of treatment for men who have gone astray, and new expectations for them, and aims to restore and reclaim them.

The state prison was opened in 1805. Under legislation enacted a year later, all convicts who were sentenced to solitary imprisonment and hard labor, no matter how short the term, were sent to it. All other sentences were served in the jail. The house of correction, of colonial origin, was solely for minor offenders—vagabonds, etc. The statute of 1811 (Ch. 32) made some changes, but did not alter the law regarding commitments.

In 1818 (Ch. 123, §1) some of the distances being long (Maine was then a part of the state) and facilities for transportation being meagre and the cost burdensome, provision was made that the sentence of a first offender, if it did not exceed three years, might, but not must, be executed in a jail or house of correction—a radical change in the use of the latter.

The law of 1834 (Ch. 151) revising the laws regarding county prisons, retained this provision regarding sentences of first offenders, and it was incorporated in the Revised Statutes in 1836 (Ch. 139), together with a new provision, that no one should be sentenced to the state prison for a less term than one year. This limitation remained unchanged thirty-four years.

The first radical change in the uses of the prisons was made in 1870. The state prison had become overcrowded. To remedy that condition, a law was passed (Ch. 208) providing that, in the discretion of the court, any sentence to solitary imprisonment and hard labor not exceeding five years, might be executed in a jail or house of correction. This put the county prison on the same level as the state prison as a place for the punishment of felonies. One year continued to be the minimum sentence to the state prison.

This permission to use the county prison as a place for the punishment of felons, did not materially lessen the overcrowding of the state prison by short-term commitments, and in 1877 (Ch. 190), another radical change was made. The minimum sentence was increased to three years. All shorter sentences were to county prisons. By this exclusion from the state prison of men who had sentences of less than three

years, many offences which had been felonies became misdemeanors.

In 1895 (Ch. 504) when the indeterminate sentence was adopted, the minimum sentence to the state prison was reduced to two and one-half years—substantially the equivalent of the three years of the definite sentence, less allowance for good behavior.

In 1918 (Ch. 257, §464), the law regarding commitments to houses of correction was so amended that no sentence exceeding two and one-half years shall be served in them, making the maximum sentence to a house of correction and the minimum sentence to the state prison identical.

In none of these statutes is there one line which can be construed as an expression of a purpose of the legislature to differentiate imprisonment in a house of correction from imprisonment in the state prison. All the changes have been made merely to facilitate and improve prison administration, solely as a matter of convenience and to save expense, and not to affect the status of an individual offender in the eye of the law. There has been no indication, in them, that the state desired or intended to add to the brief list, a dozen or so, of offenders upon whom "infamous punishments" were imposed when the constitution was adopted.

It must be remembered that the state prison was established solely because the jails and houses of correction were insecure. At one time it received prisoners on sentences of only a few months, later, a minimum of one year was fixed, followed by a provision that if the convict was a first offender he might be imprisoned, in a county prison. Later, solely on account of overcrowding of the state prison, authority was given to sentence a man to a jail or house of correction for five years, and as that did not prevent the overcrowding, all who had sentences of less than three years were excluded, and still later this was reduced to two and one-half years. Every raising of the minimum limit took a considerable number of offences out of the category of "felonies" and made them "misdemeanors." The boundaries of the two classes were movable, at the discretion of the legislature.

It is necessary, however, to consider other legislation. The judicial opinion which led to the enactment of the present law defining "felony," was rendered in 1852, in the trial of

one Stephen Carey for murder. (*Com. v. Carey*, 12 Cushing, 246). The accused had been arrested without a warrant by the keeper of a railroad station (a constable) who believed he had broken into the station to steal. He demanded that the constable show his authority, and soon after, while the officer was busy, jumped through a window and ran. The officer pursued and was overtaking him, when he fired and killed his pursuer.

On his trial for murder, his counsel asked the court to rule that as the act of the accused was not a felony, he could not be arrested legally without a warrant.

Chief Justice Shaw, speaking for himself and his associates, Justices Fletcher and Bigelow (a majority of the supreme court), ruled that a constable or other peace-officer could not arrest a person without a warrant, for a crime proved or suspected, if such a crime were not an offence amounting in law to felony.

"This is the old established rule of the common law, adopted and acted upon in this Commonwealth, by which courts of justice are bound to be governed until altered by the legislature." The jury, thus instructed, returned a verdict of manslaughter.

Referring to the fact that legislation had obliterated in a great measure the line of distinction between felonies and misdemeanors, the court said that, "It had not changed the rule in question," and added this suggestion:—

"Perhaps it might be more wise in the legislature to make the rule in question applicable to offences by a different standard of aggravation—by being punishable in the state prison or otherwise."

Apparently the legislature of 1852 acted under a misapprehension of this suggestion. The court did not recommend that the legislature define a felony, but merely suggested that it change the old common law *rule regarding the right to arrest without a warrant*, so as to authorize such arrests in other cases. A score of such statutes have since been enacted, broadening the rule. Instead of merely amending the *rule*, as suggested, the legislature passed a law (Ch. 37), defining a felony as an offence punishable by death or imprisonment in the state prison. No matter where his sentence is served, or how brief it may be, even if he is put on probation, a man who

might have been sentenced to the state prison, is forever a "felon," with all which that implies.\*

In 1857 the supreme court (divided) rendered a very important decision regarding "infamous punishment." (*Jones v. Robbins*, 8 Gray, 349). The question at issue was whether a man could be held to answer in a court which had neither a grand jury nor a traverse jury, for a crime punishable by imprisonment in the state prison.

The opinion of the court was that he could not be so held, the consideration of the question "leading to a strong conclusion of the general understanding of the legislators and jurists of Massachusetts, that punishment in the state prison is an 'infamous punishment,' and cannot be imposed without both indictment and trial by jury."

The reasoning by which the court reached its opinion included the following:

"It seems to us that, whether we consider the words 'infamous punishment' in their proper meaning, or as they are understood by the constitution and laws, a sentence to the state prison for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline.

"Some of these, a convict in the house of correction is subject to; but the house of correction, under that and the various names of workhouse and bridewell, has not the same character of infamy attached to it.

"Besides, the state prison, for any term of time,<sup>†</sup> is now substituted by law for all the ignominious punishments formerly in use; and, unless this is infamous, then there is no infamous punishment, other than capital."

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\*NOTE.—The Montana statutory definition of a felony, (Revised Codes, Section 8109) "A crime which is punishable with death or by imprisonment in the State Prison" seemed to the legislature so absurd that it qualified it by adding a proviso that, "When a crime is punishable by imprisonment in a county jail, in the discretion of the court or jury, it is a misdemeanor for all other purposes, after a judgment imposing a punishment other than imprisonment in the State Prison." The proviso is as absurd as the original, but, at least, it was a recognition of the necessity for reconciling its definition with common sense.

†NOTE.—In that year, of the 160 committed to the state prison, 17 had sentences of only one year, and 18 others of less than two years. Only 15 had sentences of ten years or more, for serious crimes.



It is not surprising that the court, in its discussion of felonies, should have ignored, wholly, the absurd definition given by the legislature in the statute of 1852.

It is this decision which has made it necessary for a grand jury to consider every case in which the offence charged is punishable by imprisonment in the state prison, no matter how unimportant it may be.

Prior to 1836, there had been no statutory regulation of the initiation of proceedings in criminal cases, nor any legislation regarding the rights of accused persons.

In that year the subject was considered by the legislature, on the report of the commission on the revision of the statutes, which had come to the same conclusion reached by Judge Shaw twenty-one years later.

It recommended a new statute, that "No person shall be held to answer in any court (except in cases of the militia when in actual service), for any crime or offence which may be punished by death, or by imprisonment in the state prison, unless upon indictment by a grand jury."

Regarding this provision, the Commissioners said: "Our constitution does not mention an indictment, but declares that 'No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him.' This would apply as well to an information, but the practice has been, at least since the adoption of the constitution, to prosecute felonies, and all high or aggravated crimes, only by indictment. And it seems proper to require the practice to continue, in cases where the punishment is death or imprisonment in the state prison."

The legislature, however, took a different view, and adopted a section (R. S. Ch. 123, § 1) reading as follows: "No person shall be held to answer in any court, for an alleged crime or offence, unless upon indictment by a grand jury, excepting in the following cases:

"First, when a prosecution by information is expressly authorized by statute;

"Secondly, in proceedings before a police court or justice of the peace;

"Thirdly, in proceedings before courts-martial."

In subsequent revisions of the statutes, this provision be-

came section 3 of chap. 158 of the General Statutes, and section 4 of chap. 200 of the Public Statutes.

In the revision of 1902 the form, but not the substance, was changed. It became section 3 of chapter 205 of the Revised Laws, as follows:

“No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury, upon a complaint before a police, district or municipal court, or trial justice, or upon proceedings before a court martial.”

It appears in the General Laws in substantially the same form, as section 4 of chap. 263.

A careful consideration of this history is necessary, if we are to determine whether the constitution requires the perpetuation of our present system, or permits a modification which will bring judicial proceedings into accord with modern views of crime and modern penal methods.

The crucial question, in reaching this decision, is, What is the “infamous punishment” from which the constitution so carefully guards every citizen?

We know what it was when the constitution was formed—that it described only capital punishment and punishments which worked a forfeiture of estate. These were imposed solely for felonies, and not for all of those. And what are “felonies”?

Chief Justice Shaw, in the opinion of the court in the case of *Jones v. Robbins* (8 Gray, 347), says they were “crimes of great magnitude and atrocity.”\* There can be no better definition. England had had some two hundred felonies, punishable by death or forfeiture of estates, but at the time when Massachusetts became a state had eliminated all but a very few. The English common law felonies, excepting a few which had been made statutory, were taken over by the new state.

The legislature of 1852, in making its wholesale definition of felonies, gave no consideration to the scores of crimes which it placed in a new category. In the first twenty-five years of

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\*NOTE.—“Atrocity” is one of the words used in the statute to describe one of the elements of first degree murder, (G. L. 265, §1). There were no degrees of murder until 1858, when murder in the second degree was defined, (Ch. 154). Burglary, the perpetrator being armed; rape; robbery, being armed, and arson were all punishable by death when the constitution was adopted, and life imprisonment was almost unknown.

the life of the state, as life became more complex, new offences had been created, punishable in the jails. When the state prison was established, it was decided that those who had sentences to solitary imprisonment and hard labor, and no others, should be sent there. All other sentences were executed in jails.

It was a rude attempt at classification, based upon the assumption that to require a prisoner to work hard during his imprisonment was a disgrace, to be attached only to those who had committed serious offences. Later, hard labor was characterized as one of the distinguishing features of infamous punishment!

When the new state prison was established there were three kinds of statutory penalties for serious crimes:

1. For some, solitary confinement, followed by imprisonment at hard labor, for a term fixed by the statute.
2. For others, solitary confinement, followed by imprisonment at hard labor for a term fixed by the court.
3. For still others, either solitary confinement, followed by imprisonment at hard labor, or mere imprisonment—within fixed statutory limits in both cases.

In imposing the first, the court had no discretion; in imposing the second, it had discretion as to the length of the solitary confinement and as to the term of imprisonment at hard labor; in imposing the third, it might, in its discretion, include or omit "solitary and hard labor." If the sentence was to solitary confinement and hard labor, it must be served in the state prison. If (the offence being the same) the requirement of solitary confinement at hard labor were omitted by the court, the convict could not be sent there, but his sentence must be executed in the jail. Under this scheme some men were sent to the state prison for a few months, while others, with sentences of years, were sent to jails.

This curious result followed: In cases of the first class, in which the statute itself fixed solitary imprisonment and hard labor as the penalty, the *law* made the offender "subject to infamous punishment;" in cases of the second class, the law did the same, but left the amount of the punishment at the discretion of the court. In cases of the third class, the law made the offender, potentially, "subject to infamous punishment," but allowed *the court* to say whether he should

actually be subjected to it, or be "let off" with a non-infamous punishment. Having, by jury trials, protected from infamous punishment all who have committed a given offence, it permitted the court to determine which of them shall undergo it and which should escape it!

This plan of allowing the court to decide whether a man convicted of a felony shall or shall not be subjected to infamous punishment is still in vogue. As to a few crimes, the law fixes the penalty, but for most of the less serious, authority is given to the court to send a man to the state prison or to a house of correction.

The Massachusetts plan of making "infamy" depend upon the place of punishment, instead of resting upon the crime, involved a distinct loss. It changed moral values by obliterating moral distinctions. Infamy is an element of punishment. The sense of shame, stronger then than now, is a powerful emotion, and has some deterrent effect, but when the stealing of one hundred and one dollars attaches the same infamy as the stealing of one hundred and one thousand, an imprisonment for two and one-half years as much as a life sentence for second-degree murder, the sense of injustice becomes stronger than the sense of shame.

One of the worst features of the present laws is that they authorize the same *kind* of punishment for a man who has a life sentence and one who is held for but a few months. They are served under the same conditions, and differ only in their length. There is no reason for imposing infamous punishment upon a man who has committed a petty offence. Is it not more reasonable to believe that in putting together in the same institution men who have short sentences and those who are to be held for life, the state intended to abolish the distinctions between infamous and non-infamous punishments, than to believe that it intended to impose infamous punishments upon petty offenders?

Of necessity the place and functions of the grand jury have greatly changed with the change in methods of detecting crime. In earlier days, when nearly all felonies were punished by death, it had an important place as a discoverer of serious crime, and as a responsible accuser. When prosecution and persecution were sometimes almost synonymous, limitation of accusations to those made by the grand jury was a pro-

tection of the citizen from oppression and injustice on the part of the government, and from loss of character by "public clamor or private malice." It was well, in view of the serious consequences which might follow, that no man should be put on trial—usually for his life—until a majority of a lawfully constituted body of inquiry had found probable cause to believe him guilty.

But with the creation of police forces, the function of the grand jury as a discoverer of crime has practically ceased. Almost without exception, the man indicted for crime has already been arrested and is in custody. The police authorities have gathered the evidence against him, and as a rule the grand jury merely reviews it and decides whether or not it is sufficient to warrant an indictment. The police have taken over its inquisitorial functions, and it rarely seeks evidence not presented by the prosecuting officer.

The care taken to protect the citizen from the injury which might come from mere rumor, was formerly so great that a grand jury was not even allowed to mention the fact that it had considered a question of his possible guilt. Now, within a few hours after his arrest, the newspapers have announced it, and the details of his crime are known to the public. If he is not indicted, he is obliged to depend upon the newspaper report of "no bill" in his case, to undo the harm which came from the story of his arrest.

These changes do not call for the abolition of the grand jury, but they do tend to affect its use, and to cause a return to its original function, as the only official accuser in cases in which the punishments are severe.

But where all distinctions between major and minor crimes have been broken down, and the great majority of those accused of technical felonies have committed merely petty offences, it is a great waste of effort and money, with no gain, to require that all cases which might be punished by imprisonment in the state prison shall be prosecuted only on indictment. The original purpose was to protect a citizen from being sent to the state prison unjustly, but the time has come to consider the modification of a system under which the grand jury is obliged to consider nearly 5,000 cases, to discover the ninety-eight who deserved state prison sentences.

The fact that nearly 2,000 pleaded guilty as soon as they

had the opportunity, and that only 383 wanted a jury trial, shows the unwisdom of the present system. Why should it be necessary for a grand jury to go through the form of indicting a man who is ready to plead guilty?

Among the changes needed is a modification of our definition of felony, in the interest of an accurate use of language. It is doubtful if a definition is needed, or is of any material value. There was none for the first seventy-two years. That which was made in 1852 reversed the English policy, under which a very long list of felonies had been reduced to a very few. It multiplied felonies a dozen times, without reason. It was, and is, grossly inaccurate. For example, calling a second theft of a bicycle "a felony" does not make it a felony. The new definition should make a clear distinction between major crimes, "of great magnitude or atrocity," to use Judge Shaw's definition, and minor offences. The crimes which are punishable only by imprisonment in the state prison should be the only "felonies."

The purposes and uses of the state prison should be stated clearly—that it is a place for the reformation of its inmates during their imprisonment.

The grand jury would keep its place for crimes classified as felonies under the new definition, and to be prosecuted on indictment, but provision should be made for prosecution of other cases on information. The supreme court has said that an information conforms to the constitutional requirement that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him." It has also said that an accused person may waive his constitutional rights, like that of having his case considered by a grand jury. Imprisonment in the state prison has been made correctional and reformatory, instead of "infamous," and the need of indictment is removed.

In many states informations have taken the place of indictments, excepting in capital cases. Certainly, if the accused so requests, thereby waiving his grand jury rights, he should have the privilege of doing so. In states where this is done, the great majority of those accused make this waiver, at a great saving of time and expense.

WARREN F. SPALDING,

*Asst. Secretary Massachusetts Prison Association.*

*Note.*

The Minnesota law (Gen. Laws 1913, Section 9159) authorizing prosecution on information instead of indictment, provides that the courts shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon information, for offences punishable by not more than ten years' imprisonment in the State Prison, which they have in prosecutions on an indictment, and all the methods of procedure are the same.

Section 9160 provides that the offence charged in any such information shall be stated in plain and concise language, without prolixity or unnecessary repetition, and all the provisions of law relating to indictments apply to informations.

Section 9162 contains a special provision for hastening the disposition of the cases of an accused person who does not wish to wait for the criminal term of the court, but is desirous of pleading guilty and taking his sentence. On his written application to the court, stating that he desires to plead guilty to the charges made against him, or to a lesser degree of the same offence, the court has power to direct the county attorney to file an information against him. On the filing of the information and of the application, the court may receive and record a plea of guilty, and cause judgment to be entered thereon and pass sentence. This can be done either in term time or on vacation, and at any place in the county which the court may designate. This is, practically, a waiver of his grand jury rights.

Those who wish to have their guilt determined by a jury are obliged to await the holding of a criminal term of the court.

Many of the counties are large, and the terms of court are infrequent. More than seventy per cent of the commitments to the state prison and the state reformatory are made under this section.

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The Georgia definition of "felony" is more accurate than those of most of the states. It is as follows: "The term felony means an offence, for which the offender, on conviction, shall be liable to be punished by death or imprisonment in the penitentiary *and not otherwise*. This excludes, as it should, the offences punishable by either imprisonment in the penitentiary *or* in the jail or house of correction.—Penal Code, § 2.

**DRAFT OF AN ACT TO PROVIDE FOR THE MORE  
PROMPT DISPOSITION OF CRIMINAL CASES  
IN THE INTEREST OF JUSTICE.**

**SECTION 1.** A Justice of a district court may at the written request of the Chief Justice of the Superior Court sit in the Superior Court at the trial or disposition with or without a jury in any part of the Commonwealth of criminal cases in which the alleged offense is punishable by not more than five years in the state prison and during the continuance of such request shall have and exercise all the powers and duties which a Justice of the Superior Court has and may exercise in the trial and disposition of such cases, provided, however, that no special justice of a district court shall so sit and that no justice so sitting shall act in a case in which he has either sat or held an inquest in the district court.

**SECTION 2.** The Chief Justice of the Superior Court may arrange for the holding of special sittings for the trial and disposition of such cases and for the attendance of jurors therefor as the interests of justice and the prompt disposition of such cases may in his judgment require. Such special sitting may be held simultaneously with other sittings of the Superior Court or at other times in the discretion of the Chief Justice.

**SECTION 3.** When a justice of a district court sits in the Superior Court as above provided, the fact of his holding court and the request of the Chief Justice of the Superior Court shall be entered upon the general records of the court but need not be stated in the record of any case heard by him.

**SECTION 4.** Justices of District Courts when sitting in the Superior Court as herein provided shall receive from the Commonwealth compensation in addition to their regular salary upon certificate of the Chief Justice of the Superior Court at the rate of \_\_\_\_\_ dollars per day and the amount of expense incurred by them in the discharge of their duties in connection with such sittings. The compensation of special justices for services in holding sessions of a district court in place of a justice of a district court while sitting in the Superior Court as herein provided shall be paid by the



county and shall not be deducted from the salary of justice so sitting in the Superior Court but shall be repaid to the County by the Commonwealth.

(Cf. General Laws C. 212 Sec. 27  
C. 218 Sec. 6.)

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*Note.*

On page 102 of the Second and Final Report of the Judicature Commission appears the following suggestion :

“that all appeals in criminal cases from the district courts, and all indictments for misdemeanors and for lesser felonies, should be tried in the Superior Court with juries, and with a district judge of the county presiding, so that it would be a sitting of the Superior Court for criminal business with juries, only presided over by a district judge. Prosecutions would as now be conducted by the district attorney or his assistants. The great advantage of this scheme is that it would utilize existing machinery without the creation of any new courts or officers, would avoid the congestion of criminal business by providing the means for a speedy trial of all cases, and lessen the evils already described. We recommend the serious consideration of this suggestion.”

This plan was brought to their attention shortly before the report was to be filed so that they had not time to prepare a draft of legislation to carry it out. The plan (but not the above draft) was recently discussed at the meeting of the Massachusetts Bar Association at New Bedford, as reported in this number of the magazine. It seems to be a business-like method of dealing with the congestion of criminal appeals in the Superior Court. For the purpose of provoking discussion and focussing attention upon the problem the foregoing draft of legislation has been prepared and submitted to Judge Sheldon and Messrs. Nutter and Green, the former commissioners who recommended the plan. It is now submitted for public consideration. There seems to be no occasion for limiting the use of district judges to their own county. Indeed it

would not be advisable. If the other recommendations of the Commission of providing for election by defendants in the district court and immediate removal to the Superior Court if a jury trial is elected should be adopted (see Report, pp. 95-96) then such removed cases could be heard with a jury by district judges as provided in the proposed act and thus congestion of removed cases could be avoided. The change of a few words in the act would cover the point of jurisdiction. The successful experience with the system of election in Maryland described by Judge Bond in *Massachusetts Law Quarterly* for May, 1921, p. 89, seems to furnish additional support for the proposal to try it in our district courts.

It should be noticed that the proposed bill provides merely that District Court judges may sit *in* the Superior Court for certain purposes, thus merely exercising in one room of the courthouse called the "Superior Court" certain limited jurisdiction and powers which the legislature has an undoubted right to confer upon them in another room of the courthouse called the "District Court." Accordingly no constitutional question is involved. (See Report of the Judicature Commission, p. 60, *Mass. Law Quart.*, Jan., 1921.)

F. W. G.

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The foregoing draft of legislation has been submitted to us and seems a simple and appropriate method of carrying out the substance of the plan recommended by us as members of the Judicature Commission.

HENRY N. SHELDON,  
GEORGE R. NUTTER,  
ADDISON L. GREEN.

Since the draft was submitted to the former commissioners, it has been suggested that the following should be added at the end of Section 1:

"Section twenty-seven of Chapter twelve of the General Laws shall apply to sittings under this act."

F. W. G.

## REMARKS IN THE UNITED STATES SENATE ON THE CROWDED DOCKETS OF THE FEDERAL COURTS.

Recently Senator Spencer of Missouri presented to the Senate an article from the Central Law Journal by Mr. Thomas W. Shelton of Virginia on the need of relief for the Supreme Court of the United States. Thereupon the following discussion took place :

MR. SPENCER.—Mr. President, the article which I have presented, and which has been ordered printed in the RECORD, deals entirely with the overburdened docket of the Supreme Court of the United States. What is true of that court, as Mr. Shelton so clearly outlines, is even to a greater degree true in regard to the United States district courts in the several districts of the United States. I ask that there may also be printed in the RECORD a brief summary of the actual conditions of the dockets of the United States district courts which was furnished me within the last day or two from the office of the Attorney General. This summary shows an intensely interesting state of affairs. There were in 1913, the year before the World War, 52,618 cases commenced in those courts; there were at the end of that year 102,012 cases pending.

If we turn from 1913 to the last year, we find that instead of 52,618 cases having been commenced there were 104,000 cases commenced, which is nearly accurate, though it is partly an estimate, because a few of the reports have not yet been received. Of those 104,000 cases which were commenced in the United States district courts in the year 1920 more than 70,000 were criminal cases. The burdening of the dockets of the courts which have to deal with the great questions of the constitutional rights of the individual with a lot of cases the punishment of which characterizes them as misdemeanors is something which should give us great concern.

This summary also shows that there were pending at the end of the year 1920, 140,000 cases in the United States district courts, as compared with 102,000 cases in 1913. The

condition is one that, of course, interests us and one with which sooner or later we shall have to deal.

Mr. President, if there is no objection, I ask that the table of cases I have presented, setting forth the facts I have stated and the data for other corresponding years, together with a statement of the expenditures incident to the Federal judiciary, may be inserted in the RECORD for our information.

MR. KING of Utah.—I hope that the table which has been submitted by the Senator from Missouri may also be referred to the Committee on the Judiciary. Some time ago, at the request of a member of the Federal judiciary, I called the attention of the Senate to the enormous amount of work which is now devolving upon the Federal judges, resulting largely from misdemeanor cases, as indicated by the Senator from Missouri. Nearly all of the 70,000 new cases are misdemeanor cases, which ought to be tried by a justice of the peace or by some inferior tribunal. I suggested at that time, and I beg leave to repeat the suggestion, that the Judiciary Committee take cognizance of the situation. I think some instrumentality, some judicial tribunal, may be devised, supplementary to the present Federal courts, in order to handle the misdemeanor cases. If that were done, then the Federal courts could go on looking after the important cases and the little misdemeanor cases, the petty cases, which ought not to be in the existing Federal courts, could be disposed of by the inferior tribunals.

MR. SPENCER.—May I say to the Senator from Utah—and doubtless there will come some suggestion from him that will remedy the situation—that the difficulty lies in the fact while everybody would agree that there ought to be some commission or some inferior tribunal created that would immediately proceed to determine these misdemeanor cases, but under the Constitution of the United States every inferior court which has to do with Federal business is a life office, holding during good behavior, and when we appoint a judge to try misdemeanor cases we have in fact created a new Federal judge, whose term of office may run long after the emergency which caused the creation of the office has ceased to exist.

MR. KING.—I appreciate that; but, in my opinion, the business of the Federal courts in the future will continue to in-

crease, and we could well have some permanent inferior tribunal as a sort of an adjunct to the district courts to take up unimportant matters and to act as referee in bankruptcy and in other matters.

MR. MCKELLAR of Tennessee.—I wish to say to the Senator, in view of what he has just said about the crowded dockets of the Supreme Court and of the district courts, that the same statement holds true of a number of the circuit courts of appeal of the United States, notably in the circuit where the Senator from Missouri has his home, the eighth circuit, the docket of which is crowded, so that the court is more than two years behind. In like manner in the sixth circuit the circuit court of appeals is about two years behind. In the fifth circuit the court is not so far behind, but in the second circuit it is very far behind. The same crowded condition exists in all the Federal courts, both in the appellate courts and in the district courts.

MR. SPENCER.—I think the Senator from Tennessee is entirely right.

MR. POMERENE of Ohio.—In view of the statement which has been made, it may be interesting to say a word with regard to the conditions in the Federal court at Cincinnati. Some months ago a movement was set on foot to create a new judgeship in that district. The United States district judge, Hon. John Weld Peck, wrote me on the subject. He has been on the bench about two years. When he was appointed the docket was overcrowded. Now, he is up with his docket, and during the last year he was assigned to Memphis, Tenn., and served one month there, and was subsequently assigned by the Chief Justice of the United States to go to New York, where he also served one month. He is on his job all the time.

MR. KING.—We want more judges like him.

MR. HARRELD of Oklahoma.—I should like to ask the Senator from Missouri if his investigations did not disclose that because of the congested condition of the court dockets there are being lost to the Treasury of the United States large amounts of money in fees, fines, and forfeitures? I should like also to inquire if, as a matter of fact, it would not be along the lines of economy to have more judges so as to take care of the congested condition of the business of the Federal courts? In

my State a short time ago I made an investigation, and have the figures which show that in the eastern district in my State there is such congestion—and great complaint is made of that—that many cases are being held up, and the Government is absolutely losing money in the way of fines and forfeitures. In my judgment, in that State at least, it would be a matter of economy to provide an additional judge. I wish to know if that is not true also in a great many other districts?

MR. SPENCER.—There can be no doubt, I think, as to the truth of what the Senator from Oklahoma has said.

The table referred to follows on next page.

*Comparison of business and expenditures — Department of Justice and United States courts.*  
(Includes all cases brought before the United States district courts, excluding naturalization papers.)

	1912	1913	1914	1915	1916	1917	1918	1919	1920	1921
<b>BUSINESS UNITED STATES DISTRICT COURTS.</b>										
Cases commenced ...	50,091	52,618	57,646	62,768	64,963	62,017	72,237	80,291	91,254	1 104,000
Increase, number of cases .....		1,927	5,028	5,122	2,195	2,946	10,220	8,084	10,963	.....
Increase, per cent .....		3.8	9.5	8.8	3.5	4.5	1716.4	11.1	13.5	.....
Cases terminated ...	46,618	53,450	56,336	60,393	75,502	65,955	86,441	88,422	68,735	± 85,000
Increase, number of cases .....		6,802	2,896	4,057	15,109	9,547	19,486	2,019	14,687	.....
Increase, per cent .....		14.5	5.4	7.1	25	12.6	22.5	2.3	17.6	.....
Number of cases pending at close of year,	102,239	102,012	120,208	132,102	129,421	118,926	100,389	96,255	118,744	± 140,000
<b>EXPENDITURES.</b>										
Justice .....	\$6,217,912.01	\$5,569,228.57	\$5,743,110.32	\$5,743,064.35	\$5,830,250.81	\$5,817,202.50	\$7,904,336.82	\$9,824,827.76	\$9,913,872.15	.....
Courts .....	4,978,660.90	4,925,431.97	4,992,808.30	5,020,163.60	4,995,288.11	5,053,222.56	5,584,935.43	5,771,938.15	6,643,490.29	.....
Total .....	10,196,572.91	10,494,660.54	10,735,918.62	10,763,227.95	10,825,538.92	10,870,425.06	13,489,272.25	15,596,765.91	16,557,362.44	± 17,900,000
Increase, amount .....		298,087.63	241,258.08	27,309.33	63,305.97	144,991.14	2,518,747.19	1,807,498.66	1,460,596.53	± 1,400,000
Increase, per cent .....		2.9	2.3	1 of 1	25 of 1	1.3	22.9	11.9	9.5	± 9
Special items .....							\$783,320.19	\$1,122,574.11	\$772,269.49	.....

<sup>1</sup> Estimated, of which 70,000 are criminal cases.

<sup>2</sup> Estimated.

NOTE. — Figures in italics indicate decreases.

## THE ELASTICITY OF THE ENGLISH JUDICIAL SYSTEM.

The following note appears in the *Solicitors Journal* of October 22, 1921.

### “UNCONVENTIONALITIES OF THE BENCH.

Three incidents of the past six months mark the growing unconventionality of our age, and its disdain of ceremonialism which is extending even to the judicial bench. The Lord Chancellor marked a new era when he left the isolation of the Woolsack to act as an additional first instance judge in the divorce court. Lord Mersey, once president of that division of the high court, and now for ten years entrenched in the dignity of the House of Lords, revisited his old sphere—dressed in plain mufti—to dispose of an undefended divorce list at the request of Lord Birkenhead. And now we read in the press how Lord Buckmaster, an ex-Chancellor, happening to wander casually into the law courts, was pressed into service as an additional judge of the King's Bench; indeed, the case he tried and disposed of is reported in *The Times*. In the nineteenth century these things would have been impossible—nay, they could not have happened even in pre-war days. Now no one attaches any importance to them, or even regards them as unusual: so far have we moved from the old English traditions which reached their climax in the Victorian age. \* . \*

### LORD CHANCELLORS AS FIRST INSTANCE JUDGES.

Of course, it must not be forgotten that in the pre-Victorian age, our Chancellors were essentially first instance judges; they sat in chancery as a matter of course, and Lord Eldon's great decisions were given in that capacity. Indeed, the old rule was that the decision of a Chancellor, sitting as a judge in chancery, was equal in weight to that of two lord justices sitting as an equity court of appeal in days before the Judicature Act, 1873. But, after Lord Eldon's days, the tendency of Chancellors was to leave ordinary judicial work to the



Vice-Chancellors, and stick to the House of Lords. Brougham and Lyndhurst, indeed, not infrequently sat as first instance judges, but their successors gradually abandoned the practice, although even as late as the beginning of the twentieth century, Lord Halsbury sometimes sat in his own court to dispose of 'wards in chancery' and other cases. \* \* \* \*

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*Note.*

The elasticity of the English system, illustrated by the facts above stated, is interesting and deserves consideration in connection with the present lack of elasticity in our own system and the recommendations of the Judicature Commission for the occasional use of Superior Court judges as single justices in the Supreme Judicial Court and of District Court judges for the trial of certain criminal cases with juries in the Superior Court, when necessary to relieve congested dockets. See draft of an act and note on pages 109-111 of this number.

F. W. G.



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FEBRUARY, 1922

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*Entered as Second-Class Matter at the Post Office at Boston.*

## THE PROPOSAL FOR AN ELECTIVE JUDICIARY IN MASSACHUSETTS.

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### INTRODUCTORY STATEMENT.

*To the Members of the Massachusetts Bar Association:*

A petition for a legislative amendment to the Constitution of Massachusetts to provide for the election of judges by the people was introduced by Hon. John J. Carey of the Senate. The proposal was numbered Senate 124 and was referred to the legislative Committee on Constitutional Law.

At the meeting of the Executive Committee of this association on January 25th, 1922, the proposal was called to the attention of the committee and a quorum being present it was unanimously

VOTED that the Executive Committee of the Massachusetts Bar Association go on record in opposition to Senate 124 and any similar measures for the election of judges.

The secretary subsequently communicated this vote to all the members of the Executive Committee who were unable to be present at the meeting and requested an expression of opinion on the subject, and received replies from 19 members of the committee, all of whom wished to be recorded in opposition to the election of judges. No replies were received by the secretary from any members of the committee in support of the proposal.

The secretary attended all the hearings before the committee of the legislature and opened the opposition by calling attention to the judgment expressed by members of the Executive Committee on the subject, and then presented an argument in opposition to the measure. This argument had not been prepared at the time of the meeting of the Executive Committee, and was not submitted to the members of that committee, and accordingly it was not presented to the committee of the legislature on behalf of the association or of the Executive Committee, but merely by the secretary as an individual citizen. In preparing it, however, the secretary

endeavored to reflect the reasons, as he understands them, why Massachusetts has maintained her system for one hundred and forty years, and the argument is now printed with some additions for the information of the bar in order to focus attention upon the discussion.

An extended argument in support of the elective system made by Hon. Joseph F. O'Connell in the recent constitutional convention was reprinted in the *Massachusetts Law Quarterly* for May, 1918, page 288. During the recent hearings before the legislature, a number of communications have appeared on the subject. Two of these are also printed here for the information of the bar. The first one by Mr. Gloag under the heading, "Keep Judges Out of Politics," presents the opposition with such force and brevity that it is printed first. The second one, by Richard S. Childs, Esq., who was secretary of the New York Short Ballot organization, contains illuminating information in regard to the operation of the elective system in that state. It appeared in the *Boston Transcript* of February 17, 1922.

F. W. GRINNELL,  
*Secretary.*

### KEEP JUDGES OUT OF POLITICS.

*To the Editor of the Massachusetts Law Quarterly:*

The Georgia Bar Association, after an experience of the elective system for twenty-two years, determined that it was a vicious and intolerable one, and has prepared a constitutional amendment under which their judges would be appointed. (Ga. Bar Assoc. Annual Meeting, 1920, pp. 33 and 48.) The Louisiana Association last year urged an appointive system. (See Am. Bar Assoc. Journal, Feb., 1922, p. 123.) The Alabama Association is reacting against the state wide primary for judicial selection (*id.* p. 122). New York repealed the state primary after ten years' experience. (See A. B. A. J., Oct., 1921, p. 517.) In Illinois \$100,000 was raised and spent to defeat the City Hall faction which, itself republican, controlled a democratic City Council through a bi-partisan system of patronage. The new draft of a constitution for Illinois provides a system of appointing *nisi prius*

judges for Cook County. (5 Journal Am. Jud. Soc., Aug., 1921, pp. 44, 46, 50.)

Human nature is weak, and a judge is as human as anybody else; and the influences at work under an elective system are insidious. There is the danger of the outside clamor becoming louder in the ears of the judge than the voice of justice—of its becoming so loud in fact as to drown the voice of the law.

Involved in the election of judges is the assumption that justice is a variable factor, to be impressed and swayed by every popular outburst and impulse.

Picture the scramble for office in our primary, in which the sole qualification are the signatures of a specified number of one's personal acquaintances. Picture the campaign of self-advertising, and the irrelevant issues designed to catch the credulous, and the vilification or disparagement of opponents.

In 1916 the editor of the *Virginia Law Register* (1 Va. Law Reg., N. S. 861) rejoicing that an attempt to elect their Supreme Court judges had met with defeat, recounted his personal observations in a neighboring State of a joint debate of candidates for an elective judgeship. There was a large crowd. One of the candidates was then holding the office; he bragged of what he had done, was lavish in promises; fawned; begged; appealed to those in whose favor he had decided cases; sought to explain away decisions displeasing to the populace. His opponent (who was elected) slurred the other's conduct on the bench, sneered at his decisions; appealed to the pistol-carrying crowd, and to the poor fellows sent to jail for selling a little liquor.

William Allen White's notion of our United States Supreme Court is that it shall be made tame and docile by placing their selection in the Senate (Am. Mag. Feb. 1909)—a pretty notion to entertain of a tribunal that English jurists regard as more august than any other on the known earth.

If we are wise and hold security in our rights, as individuals and as members of a social system, to be a priceless heritage, we will not suffer the selection of our judiciary to depend upon the personal activity of the hungry office-seeker himself, and, as would happen, upon the accidental circumstance of his name appearing at the head of the ballot.

RALPH WARDLAW GLOAG.

BOSTON, Feb. 10.

THE OPENING ARGUMENT IN OPPOSITION TO AN  
ELECTIVE JUDICIARY BEFORE THE COMMIT-  
TEE ON CONSTITUTIONAL LAW OF THE MASSA-  
CHUSETTS LEGISLATURE, FEBRUARY, 1922.

*Mr. Chairman and Gentlemen of the Committee:*

As Secretary of the Massachusetts Bar Association, I have presented to you the judgment of such members of the Executive Committee of that association as I have heard from in opposition to proposals for an elective judiciary. I also speak as an individual in opposition to this measure and in so doing I am simply expressing my own personal convictions and reasons.

The subject is too important to be confused with epithets or abuse on either side. I know that people honestly differ about this matter and I shall argue on the assumption that the supporters of the measure before you are sincere in their belief that it will be for the interest of the people of the Commonwealth as a whole. I do not agree with them and I ask that the opposition to the measure be listened to and considered in the same spirit of fairness, and I know that your committee will so consider it.

The question is not a new one in this or any other state in this country. It is as old as the constitution itself. It was raised and considered before the constitution was adopted. It was publicly brought before the people again at least as early as 1806, and it has been discussed from time to time before constitutional conventions and before the legislature ever since. There have been three constitutional conventions and about 140 legislative sessions since 1780 at which this subject could be considered. The latest extended discussion was at the recent constitutional convention of 1917, where it was finally rejected on the 14th of June, 1918, by a vote of 125 to 32 as appears by the Convention Journal, on pages 638-9.

I do not propose to argue the question merely on the ground of past history, but it would be absurd for any one to say that the fact that any institution of government has survived the political storms of 140 years is not a fact of importance

to make fair-minded men pause and reflect when it is proposed that it should be changed.

In thinking over the method of approaching the subject most likely to be of assistance to your committee, it seemed to me that Chief Justice Shaw has suggested that method of approach in his permanent message to the bar and the people of Massachusetts in his last public utterance. You will find the passage on page 188 of Judge Chase's life of the great chief justice:

"Above all let us be careful how we disparage the wisdom of our fathers in providing for the appointment to judicial office, in fixing the tenure of office, and making judges as free, impartial, and independent as the lot of humanity will admit. Let no plausible or delusive hope of obtaining a larger liberty, let not the example of any other State, lead you in this matter to desert your own solid ground, until cautious reason or the well-tried experiment of others shall have demonstrated the establishment of a judiciary wiser and more solid than our own."

Imagine yourselves for a moment in the presence of the man, who was one of the great judges in American history, after he had finished the thirty years of his distinguished service as a judge. Imagine him sitting down quietly with you gentlemen in your committee room to talk this matter over and asking you whether "cautious reason or the well-tried experiment of others have" since his death in 1860, "demonstrated the establishment of a judiciary wiser, and more solid than our own?" I take it, gentlemen, that is the question which you must naturally ask yourselves because that is the question which our wisest judge left as a permanent question to be considered by the people of Massachusetts and their representatives in connection with this matter.

In answering that question, you, Mr. Chairman and gentlemen of the committee, naturally will ask yourselves other questions suggested by the discussion before you, some of which I shall mention.

1. Why is it that the West Publishing Company reports in a public advertisement on the inside of the back cover of the "Docket" for December, 1921,



“that a careful investigation discloses the fact that the decisions of the Supreme Court of Massachusetts are cited more frequently than those of any state court?”

2. Making all due allowance for the imperfect working of any human institution of government, is it likely that a change to an elective judiciary will result in less politics and more independence and impartiality in the administration of justice? Is it true that the system of selecting judges in New York, Illinois and elsewhere works in practice in so admirable a manner as the supporters of this measure believe it to work?

3. How much do we know as to the exact details in connection with the election of judges in these other states?

4. It has been suggested in argument before you that the leaders of the New York bar have not suggested a change. Why is it that the late Joseph H. Choate, who was more than fifty years at the New York bar and who was described as “the heart not less than the head” of the American bar, volunteered this statement in February, 1917, a few months before his death, in a letter, copy of which I will submit to your committee. (See Mass. Law Quart., May, 1918, p. 312.) He said, “I feel intense interest in the judiciary of Massachusetts, and cannot believe that our grand old state will depart from its stoutly maintained conviction that an appointive judiciary is the only admissible one.” Why did he volunteer that statement?

5. Why is it that about the time when the New York constitutional convention of 1915 met a committee of leading members of the New York bar, including among others Alton B. Parker and Morgan J. O’Brien, both former members of the New York Court of Appeals, adopted a recommendation containing the following statement:

“Your committee is of opinion that the best and most practicable method of securing learned, experienced, upright and impartial judges and of maintaining their independence is by appointment and not by election. . . .”  
(See Mass. Law Quarterly, May, 1918, pp 307-8.)

The recommendation of these gentlemen was not followed by the New York constitutional convention, but in view of

this recommendation the leaders of the New York bar cannot be relied upon as enthusiastic supporters of the idea of an elective bench. Why not?

6. Turning to Illinois, let us see what a careful student of practical conditions in Cook County says about it. In a book called "Unpopular Government in the United States," Albert M. Kales, a practising lawyer at the Chicago bar, writes as follows:

"In a metropolitan district, . . . where there is a large population and a governmental plan which reduces the most intelligent inhabitant to an extreme degree of political ignorance as a voter, and the establishment of extra-legal government by politocrats is thus secured and fostered and becomes the real government, the judges, though the electorate regularly votes to instal them in office, are not in fact elected at all. They are appointed. The appointing power is lodged with the politocrats of the extra-legal government. These men appoint the nominees. They do it openly and with a certain degree of responsibility under the convention system. They do it less openly and with less responsibility when primaries are held.

If you wish to test the soundness of these conclusions inquire your way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief, and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by politocrats. The judges in a metropolitan district where the extra-legal government rules and where elections for judges are held are not subject to a recall merely. They are subject to a progressive series of recalls. They are subject to recall by the politocrats who sit upon the governing board of the party organization. These may refuse a

nomination at the time of an election. If the judge secures the nomination he may be recalled by a wing of the organization knifing him at the polls. He may be, and frequently is, recalled by reason of an upheaval upon national issues. . . . The plain truth is that in a metropolitan district the selection of judges by some sort of appointing power cannot by any possibility be avoided."

Why is it that we find a man of the ability and character of Kales making such statements? Is it not likely that there are some undesirable details in Illinois politics connected with the bench which we do not want in Massachusetts? Was there not a political attempt last year by a political leader in Chicago and his associates to fill up all the judicial vacancies for very practical political purposes? Was not this judicial election advertised all over the United States through the press? The fact that the movement was defeated by a vigorous and expensive campaign which aroused the Chicago bar is to the credit of that bar, but it is not to the credit of the system that the business of the courts and of the community should be interfered with by such elections.

7. How are the campaign expenses paid in judicial elections in these other states? Are the judges assessed? Is there a regular percentage of their salaries during a period of the term which goes to some political organization? How is it done? I do not pretend to know. Most political campaigns cost somebody something in an important election. The country has just been edified by much public criticism of the recently seated senator from Michigan for spending too much money in his campaign. It has not been publicly stated how much money was spent by his opponent. Do we want to put the judiciary of Massachusetts in a position in which such expenditures and such criticisms of expenditures are invited?

8. Turning now to Ohio, we have had some very direct evidence recently produced by Massachusetts men and also by a leading lawyer of Cleveland, Ohio, who addressed the members of the Massachusetts Bar Association at its annual meeting at New Bedford, last October. The judges of the Municipal Court of Cleveland are elected for short terms. Two or three years ago, the chief justice of that court was tried

for murder in the second degree. The jury disagreed. He was tried a second time and acquitted. He was then found guilty of contempt for perjury, committed during the trial for murder. You will find the story told by Mr. Amos Burt Thompson in the January number of the "Massachusetts Law Quarterly" for 1922, copy of which I will hand you. This dramatic incident, while it related to only one judge, stirred up such an agitation that a Citizens' Committee was formed, of which Mr. Thompson was chairman, and they did a thing which is unique in the history of America. They invited men from different parts of the country to come to Cleveland and make a study of their system of administering justice. The subject of the criminal courts was assigned to two Massachusetts men. What did they find as to the practical working of an elective judiciary in the Cleveland Municipal Court?

Mr. Smith has summarized it in a recent article, from which I quote: (Mass. Law Quart., August, 1921, pp. 185-6.)

"In the course of . . . electioneering the judges are forced to speak and act in a manner inconsistent with and repugnant to any decent conception of judicial office. With the bogey of re-election constantly hovering in the foreground the covert pressure exerted by groups and organizations cannot be disregarded as it should be. The political lawyer with his control of votes becomes a man of importance, to be placated if possible. As his potential competitors at the next election who are off the bench are continually striving to create and develop their own influence in the community, the judge on the bench must do likewise. He must become known, his name must be seen in the papers, and therefore he gets an assignment to sit in the criminal sessions of the court because criminal cases have superior news value. The doing of justice forbids the granting or receiving of favors, but in an open election the judge must beg for votes and, after he has lost his private practice through years of service on the bench, he must beg hard. It is next to impossible to make an effective political speech without at least impliedly promising something to somebody. Such conditions destroy scruples and cause a progressive deterioration from bad to worse, so that in Cleveland today we

find judges permitting the solicitation of campaign funds from lawyers who practise before them and the insertion of large paid advertisements of themselves in the papers. In one instance a judge has assumed to administer justice in a court room adorned with political placards urging all those in attendance to vote for him. The method of selecting judges now obtaining in Cleveland puts a premium on self-advertisement and compels the currying of favor. It is detrimental to all parties concerned, and is thoroughly bad."

Turning to the address of Mr. Thompson, he says, "We do find that there is particularly prevalent the baleful influence of the lawyer who practises more politics than law. That is naturally more harmful in a community where the elective system prevails."

Mr. Thompson produced a campaign card, which is reproduced in the January number of the Quarterly on page 67, copy of which I will hand to your committee.

When one looks at that campaign card and considers the practical opportunities of self-advertising and mud-slinging which sometimes accompanies political campaigns for votes even in the Commonwealth of Massachusetts one naturally wonders what would happen in a judicial election in Massachusetts. I think your committee will naturally ask yourselves whether it can possibly be for the interest of the people of Massachusetts to subject our judges to the ordeal of such a campaign, to force them into politics, into the business of promising things which they have no business to promise directly or indirectly and telling everybody what good judges they are and what a fine brand of Massachusetts justice they will administer, and you will ask yourselves whether it will be good for the people of Massachusetts or for the bar of Massachusetts to begin to think more than they do today about the political affiliations or obligations, or influences connected with our judges.

9. Much of the criticism before your committee as well as in the constitutional convention was directed at judges in the district courts or at special justices of those courts. But, is the elective system likely to make them any better? Is not the better course that of improving the district court system

in such a way as to make the work of those judges more important, more responsible, more useful to the people of the Commonwealth and, therefore, more important and responsible in the eyes of the appointing power and of the judges themselves? Without intending to idealize the district courts or any other courts in Massachusetts, I submit that much of the difficulty with the district courts is not so much the fault of the judges as of the antiquated system which renders much of their work ineffective and wastes much of the judicial power that might otherwise be effectively used.

10. There is another aspect of the question before you which is not always emphasized as it should be. It is particularly important upon any genuinely democratic theory of government that the people should be able to get the benefit of the best judicial capacity whenever and wherever it may be found, whether it is in a man who is sufficiently well known or "available" to be elected or not. One of the most serious objections to an elective system is that it absolutely shuts the door of the bench to those men whose habits, whose training, and whose tastes are such as not only to make them not available under an elective system, but prevent them from becoming candidates. There are many men who have helped to make the Massachusetts courts great who would not have sat on the bench under an elective system. It is not necessary to mention them all, but I will mention four: Chief Justice Parsons, Chief Justice Shaw, Chief Justice Gray, and Chief Justice Holmes. The list could be enlarged by the addition of names of others, both among the living and the dead, but if your committee will consider carefully the history of these four men whom I have mentioned, you will, I think, be satisfied that Massachusetts would never have had their services on the bench under an elective system. Parsons was appointed without his knowledge, and accepted the position at a sacrifice of about three-quarters of his income.\* Shaw did about the same.† Gray and Holmes, both of whom were appointed later to the Supreme Court of the United States, were men whose training and habits as scholars were

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\*For the story of Parsons' appointment see Mass. Law Quart., May, 1917, pp. 523-4; as to income see p. 538.

†For the story of Shaw's appointment see Chase pp. 134-140; as to income see p. 131.

such that they would not have become candidates for an elective position. Would Massachusetts have been better if these men had never appeared upon the bench?

One of the speakers in support of this measure spoke of the appointive system with tenure during good behavior, as we have it in Massachusetts, as a survival of the monarchical system of feudalism in England. But those who feel this way seem to forget that the tenure of judges during good behavior did not come in England until the Act of Settlement in 1700, and that, instead of being a monarchical plan it was a great step taken to protect the English people against the Crown because, up to that time, the judges held their offices only during the pleasure of the King and it was through the power of removal that the Stuart kings had been able to dictate to the courts. The Act of Settlement did not apply in the colonies and it was because of this fact that one of the controversies arose immediately preceding the Revolution. When King George III undertook to pay the salaries of the Massachusetts judges, a dispute arose over this matter between John Adams and Gen. William Brattle, which is described in the May number of the Massachusetts Law Quarterly for 1917, pages 397-398. John Adams demonstrated the fact that there was nothing in the commissions of the judges of Massachusetts at that time to prevent their removal by the Crown and that they were, therefore, in as dependent a position as the judges under the Stuart kings. Accordingly, the Massachusetts principle of an independent judiciary, instead of being a survival of a monarchical institution, was a recognition of the principle which was established in England in 1700, as one of the great steps in restraining the exercise of arbitrary power. The movement for the election of judges which swept over other states in the middle of the nineteenth century in the name of "democracy", merely restored the subservient condition of the political judges in England before 1700. Massachusetts stood by the principles on which her character as a state is based. Shall she surrender them now?

Some remarks of Dean Pound were referred to by one speaker in criticism of the action of some courts in other states, but Dean Pound cannot be used in support of an elective bench, for he appeared before the Judiciary Committee of

the Massachusetts legislature a few years ago and said that the people of Massachusetts did not know what an elective judiciary meant, and that they ought to thank God that they did not have one. If any further and more recent evidence of Dean Pound's views on this subject are desired, they can be found in his summary of the administration of the criminal law in Cleveland, Ohio, which appears as part of the Cleveland Survey, recently published.\*

The address of Ex-President Taft, now chief justice of the Supreme Court of the United States, delivered before the American Bar Association at its meeting in 1913 also may be read in connection with this subject. It will be found on pages 418-435 of the reports of the American Bar Association for that year.

#### AN ANSWER TO THE CHARGE OF "USURPATION BY THE COURTS."

There is another kind of attack upon our judicial system in Massachusetts which is directed peculiarly at the Supreme Judicial Court. A prominent member of the bar has been quoted in support of this comment. It is said that our courts have usurped the power of declaring unconstitutional statutes passed by the legislature, and that such power ought not to be trusted to judges, that it was never intended to be trusted to judges and, if they are to have it, they should be subject to popular election. I appreciate the sincerity of the belief of many supporters of the measure before you in this point of view, but I submit that it is mistaken. The history of the subject in Massachusetts has been largely forgotten. It is common to say that the courts have usurped this power and that they follow in the footsteps of John Marshall, who is referred to as the first great usurper in this field. Those who say this seem to forget that it is not a question of power of the courts. It is a question of the duty of the courts.

This duty was first proclaimed, developed, and established in Massachusetts as one of the central ideas of the Revolution a quarter of a century before John Marshall wrote the opinion in *Marbury v. Madison*. It is one of the hardest duties which the courts have to perform. It is a duty in which they assist the legislature to an incalculable degree. The doctrine that acts of the legislature should be subject to the test of constitutional principles by an impartial, independent court, was

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\*See also Mass. Law Quarterly for May, 1918, pp. 314-15.



the great contribution of James Otis to the history of American law in his argument against the Writs of Assistance delivered in the Old State House in 1761. This duty was written expressly into the last article of the constitution of 1780, where it has remained ever since. That article provides that the constitution shall be part of the "law of the land" and shall be "prefixed" to every edition of the laws of the Commonwealth, thus making it the duty of every judge to read the constitution before he reads a single statutory word. In 1782, the Supreme Judicial Court speaking through its first chief justice, William Cushing, expressly applied that constitution to a case before it involving the issue of slavery and, by that decision, ended slavery in Massachusetts. (See *Mass. Law Quarterly* for May, 1917, p. 437.) That decision has been generally forgotten in the discussions of constitutional law. Why is the picture of James Otis in the State House?

That is not all. The movement for the formation of a state constitution after the Revolution received its main impulse from Berkshire County. The Berkshire County men, under the lead of Thomas Allen, refused to allow the highest court of the then-existing government to sit in Berkshire County until a constitution was formed which should be a test of legislation. The men in Berkshire County were afraid of being subjected to the unrestrained legislation of a body which met in the more populous eastern seaboard counties of the state. The movement for a constitution in Berkshire can have no meaning except that it should be the duty of the courts to apply the constitution directly as law and to test the validity of statutes in the light of constitutional principles.

As I think you will see, when you consider it, instead of having usurped power in this respect, the American doctrine of constitutional law imposed this burden on the courts as a duty and this duty was first conceived and fully developed in the Commonwealth of Massachusetts. From this Commonwealth, it spread throughout the nation. It is the great contribution of America and, to a considerable extent, of Massachusetts, to the science of government. That mistakes have been made here and there by this or that court in the performance of this difficult duty is doubtless true, but that does not lessen the fundamental importance of the duty. Certainly our Massachusetts court has generally been regarded

as one of the most enlightened in the performance of this duty.

A sentence used by Ex-Governor Bates at a recent legislative hearing in describing the responsible powers of our Supreme Judicial Court and their relation to the future of the state has been twisted out of all perspective in some of the newspaper reports and in, at least, one editorial. It is true that the court has the decisive voice on constitutional questions so far as the interpretation of statutes and the constitution go, and when one looks at the court solely with that in view it is easy to attribute an exaggerated position to the Court. But, when we consider the wide range of legislative power in all its bearings, including the power to pass new statutes, to formulate and submit constitutional amendments, etc., it is obvious that the court merely performs one of several essential functions of government in our system, and it is a function which is becoming recognized in other parts of the world, rather than the reverse. Dean Pound has called our attention to the following facts:

“—the American development of the common-law doctrine of supremacy of law, in our characteristic institution of judicial power with respect to legislation, however much assailed at home, is commending itself to peoples who have to administer written constitutions. In the reports of South American republics we find judicial discussions of constitutional problems fortified by citations of American authorities. In the South African reports we find a court composed of Dutch judges, trained in the Roman-Dutch law, holding a legislative act invalid and citing *Marbury v. Madison* along with the modern civilians. Notwithstanding a pronouncement of the Privy Council in England, the Australian bench and bar insist upon the authority of Australian courts to pass upon the constitutionality of state statutes, and the Privy Council itself has felt bound to pronounce invalid a confiscatory statute enacted by a Canadian province. Even continental publicists are found asserting it a fundamental defect of their public law that constitutional principles are not protected by an independent court of justice.”

The duty of the courts in regard to legislation was expressly recognized in the I. and R. Amendment as applicable to legislation under that provision.

If the members of the legislature would pause and consider for a moment what the situation might be if this duty in regard to statutes were not imposed upon the court and the legislature was left with absolutely unrestrained freedom of action, they would realize how great is the assistance rendered, not only to the people, but to the legislature itself in the performance of its difficult duties by our court, and the farsightedness of the men of 1780 in recognizing the importance of this function in the plan of government which was then framed and adopted.

In the long run, the court and its functions is, as it has been described from the beginning, in many ways the weakest of the departments of government from a political point of view, because the judges cannot defend themselves against attack and their only real power arises from the general soundness of their work and the general confidence and respect for the courts resulting from that work, as tested by its practical results over a long period of time. The general confidence and respect for the courts of Massachusetts results from the fact that most of their work has stood the test of the practical life of the community for over a century.

Just as John Marshall and his associates stated in their opinions the ideas of government which held the nation together during the Civil War—just as Chief Justice Shaw and his associates expounded the common law and constitutional law in such a manner and to such an extent as to convince succeeding generations of lawyers and stabilize the government of Massachusetts, so I believe our court today in its judgments in general is reflecting the sound instincts of the great body of people throughout the Commonwealth. Thomas Allen, the leader of the Berkshire Constitutionalists in 1776, stated the reason for the Massachusetts Constitution and for the function of the court in applying it, and it has never been stated more powerfully since that time. He said, as you will see on page 12 of the pamphlet submitted herewith:

“Every man by nature has the seeds of tyranny deeply implanted within him so that nothing short of omnipo-

tence can eradicate them. . . . The first step to be taken . . . is the formation of a fundamental constitution as the basis and groundwork of legislation. . . . Knowing the strong bias of human nature to tyranny and despotism we have nothing else in view but to provide for posterity against the wanton exercise of power which cannot otherwise be done but by the formation of a fundamental constitution. . . . Let it not be said by future posterity that . . . we made no provision against tyranny among ourselves."

The meaning of this movement in Berkshire County, which was a movement of laymen and not of lawyers, and the debt that we owe to Thomas Allen generally has been overlooked, but it is time that they were recognized again. The Massachusetts Constitution and indirectly the Constitution of the United States owe more to the initiative and power of statement of Thomas Allen than is generally realized. What he said has as much significance today as it had between 1776 and 1780.

Do the people of Massachusetts as a whole really believe that our judges today and during the past 140 years have been controlled by sinister influences? The public confidence and respect for the courts in this state certainly do not indicate that as the general opinion of the people. I might go on and refer to the great speech of Rufus Choate in the constitutional convention of 1853 in support of our Massachusetts system of judicial selection and tenure. (Reprinted in Mass. Law Quart., Jan., 1917, p. 221.) But I will close by quoting a passage from a striking and courageous speech by Hon. Frederick W. Mansfield in December, 1916, at a dinner of the Boston University Law School Association. He said:

"As one who has had some experience in the trial of so-called labor cases, I hope I may be pardoned if I venture to say a personal word of commendation and approval of the Supreme Judicial Court of Massachusetts. In this practically new and unexplored field our Supreme Court has probably penetrated further than any other civilized tribunal. In many of its decisions it has been most liberal in its views and in its treatment of the work-

man. In many cases it has laid down rules of law that have been and will be invaluable to organized labor. It has been most painstaking and careful, eminently fair, and absolutely fearless. It has lived up to the highest, noblest, and best traditions of Massachusetts, and no greater praise can be accorded to it.

And surely the poorest and the humblest member of society needs just such a Court—needs a fearless judiciary. He needs able, honest, and strong judges far more than his more wealthy and more fortunate neighbor. The wealthy litigant can surround himself with eminent and high-priced counsel—the poor litigant must often be content with inferior counsel, or with none, in which case he must depend entirely upon the judge. The judiciary is the best defensive bulwark of the weak against the encroachments of the strong, the powerful, and the selfish.” (See Mass. Law Quart., Jan., 1917.)

And so, gentlemen, I ask you again to imagine yourselves in the presence of Chief Justice Shaw and to answer the question which he suggested to you, whether “cautious reason or the well-tried experiment of others” has “demonstrated” clearly to your satisfaction “the establishment of a judiciary wiser and more solid than our own?”

F. W. GRINNELL.

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#### NOTE ON THE FEDERAL ASPECT OF THE PROBLEM.

The present movement for an elective judiciary in Massachusetts has two aspects. One is local. But there is also a broader issue, which is obscured by the local agitation and which few members of the Massachusetts bar realize. There is and has been for some years a well-defined movement, the ultimate object of which is to make the entire federal judiciary elective from the Supreme Court down. The Massachusetts judiciary and its history is the main fortification of the federal system which grew out of it. If the Massachusetts system can be broken after 140 years of experience, the entire federal judicial system will be exposed to attack as it never has been exposed before.

The only situation which would be comparable to it in our

history is the period about 100 years ago when John Marshall and his court were under attack because Marshall was expounding those principles of the government created by the federal constitution which eventually held the Union together through the Civil War. In spite of the ferocious criticism and abuse which was directed at Marshall and his court, because of their opinions, the general soundness of the principles of government which they explained stood the practical test of life and satisfied the American people during the growth of the country in the nineteenth century. Accordingly, the movement, which looms up in the background, for an attack on the federal judicial system which would threaten the stability of the entire structure of government must not be lost sight of.

F. W. G.

### ELECTIVE JUDGES IN NEW YORK.

*Reprinted from Boston Transcript of Feb. 17, 1922.*

Being a citizen of New York, it is not my business to offer advice to the people of Massachusetts concerning the popular election of judges, but in my capacity as secretary of the New York Short Ballot Organization, I once assembled some material on the working of the elective judiciary for the constitutional convention of 1915, and, accordingly, find myself somewhat dismayed at the thought that anybody in Massachusetts could dream of picturing our elective judiciary as a desirable model.

The facts are these: Our Court of Appeals is privately hand-picked by the highest leaders of the two political parties, who sometimes nominate the same candidate on both tickets, and sometimes do not. They do, however, handle these nominations reverently, and our Court of Appeals is good. The people, however, have nothing whatever to do with that, and, except for some of the lawyers, the people are practically unaware of the elections for this office. Not one voter in a hundred can tell you on election day the name of the man he voted for for Court of Appeals, so trivial is the publicity and public attention! Of course it would be nice if the people would participate and play the part assigned to them, but they don't,

and they never have and never will, so why be theoretical about it?

Our Supreme Court is also good in character in the up-state and rural districts, outside the large cities, thanks to a good tradition, and the voters are somewhat more aware of the fact that such an office is being filled. In the cities of Buffalo, Rochester and New York City, neither the Supreme Court judges nor the county and municipal judges receive any attention from the rank and file of the people at all. Those offices are simply lost in the shuffle and stand or fall with the party ticket. These judges are mediocre, and are always drawn from political ranks, and the nominations are sometimes scandalously bad. In which case, it is almost impossible to attract enough attention to the issue to make any material difference in the party vote. They receive their flowers and congratulations before the election and frequently before the party primary!

It is usual for judicial nominees to make very large contributions to the party treasury, and to repay the party machine by distributing refereeships and other judicial patronage among the party workers. In one comparatively recent case on Long Island, the purchase of a judicial nomination from a political boss (for cash), landed the purchaser in State's prison. The case caused no surprise here! In another case, in Brooklyn, a surrogate appointed the local boss to a very highly paid position; whereupon the boss nominated his superior for a higher court.

From time to time, when a judge dies in his term, our governor appoints to fill the vacancy. We have had all kinds of governors, yet these judges that reach the bench by appointment are universally agreed to be far above the average product of the elective system. Political reformers in both New York and other states having elective judiciary, are contending for change to the appointive system; for example, the American Judicature Society, which is the national association of lawyers who seek improvement of the bench, and the National Municipal League, whose model constitution favors appointment.

Massachusetts court decisions have a higher standard in courts throughout the United States than those from any other bench, and, among those who know about such things

it is universally agreed that Massachusetts leads the Union in the technical capacity and the probity of its judges. This, however, would not be the end of the case if there was any proof that the appointive judiciary was less in sympathy with popular opinion and the prevailing morality than elective courts; but the facts are that appointive judiciaries are more progressive and less bound to dead precedent than the comparatively mediocre elective judiciaries. It was our elective Court of Appeals, for instance, that upset the workmen's compensation act in the famous Ives case, and it was an appointive Federal Court that sustained the principle!

Here, in New York, we know by actual and frequent comparison that the governor is more sensitive to popular criticism when he chooses a judge than the political machines are. It is easier for the people to control the character of the bench through a conspicuous and responsible governor than by competing with greedy political bosses in the slippery task of choosing every separate judge at the polls.

Those who support elective judiciary in Massachusetts fondly imagine that putting judges on the ballot will result in their selection by the people. Alas! They are theorizing and ignoring a huge mass of contrary experience.

RICHARD S. CHILDS.

NEW YORK, Feb. 15.

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*Note.*

Perhaps Shakespeare is considered old fashioned today, but since he furnished much of the education of Abraham Lincoln, we might turn to him, at least, in a spirit of antiquarian interest. And, when we learn of such practical details as those above set forth from other states, the question arises whether we want a system which would encourage judges to

"Crook the pregnant hinges of the knee  
Where thrift may follow fawning."

F. W. G.



## THE NEW PLAN FOR CONTINUOUS CONSOLIDATION OF THE GENERAL STATUTES OF MASSACHUSETTS.

By Honorable BENJAMIN LORING YOUNG, Speaker of the House of  
Representatives.

On April 6, 1916, Governor McCall approved Chapter 43 of the Resolves of that year, entitled "Resolve Providing for a Consolidation and Arrangement of the General Laws of the Commonwealth." On January 4, 1922, upon the convening of the General Court, the Secretary of the Commonwealth delivered to the President of the Senate and the Speaker of the House of Representatives two volumes, bound in buckram, with pages numbered respectively, exclusive of introductory matter, 1 to 1291 and 1292 to 2873 and bearing the inscription "General Laws of Massachusetts 1921." The next copies, as available, are being distributed to the justices of the several courts and to other public officials, but before this article appears in print the entire issue should be on public sale.

The permanent index will not be ready for several months. The temporary index was placed on sale sometime ago and may be readily supplemented by the tables of disposition of the laws which are printed on pages CXIII to CCLVIII in Volume I of the General Laws. These tables are arranged in greater detail and completeness than in any previous consolidation and enable the reader to find quickly the location of any section of the Revised Laws of 1902 and general statutes enacted thereafter.

What has this consolidation cost the Commonwealth, the courts and the legal profession—in time, money and inconvenience? Nearly six years have elapsed since the original Resolve was approved by Governor McCall, an even longer time since its introduction in the General Court. The cost to the Commonwealth in money cannot yet be finally ascertained, but the total will be not less than half a million dollars net, exclusive of those expenses for which the Commonwealth will be reimbursed through the public sale of

the General Laws. As to inconvenience—let the reader judge for himself.

A brief history of the consolidation, a description of the methods adopted and the work accomplished by the Commissioners appointed by the Governor and by the General Court and Committees thereof, with notation of dates and documents, appear in the Introduction printed in the first volume of the General Laws and hence need not be repeated here.

The legal profession should realize that the main credit for the General Laws is due to the Commissioners and the able assistants employed by them. They were engaged in the task from May 1916 to December 1920, when this work, practically accomplished, was turned over to the General Court. And if this article contains a plan for future action which commends itself to the Legislature and the Bar, let it be known that the suggestion for this plan was originally conceived by one of the Commissioners, Mr. James Arnold Lowell.

A general consolidation of the laws no matter how well done is bound to involve delay, inconvenience and expense. Can we avoid these objectionable features and still obtain the benefit of consolidated and revised statutes, reissued from time to time at convenient intervals? The new plan for continuous consolidation is believed to offer a remedy and has already been established by the Legislature. In January 1921, at the opening session of the House of Representatives, the writer, in the capacity of Speaker of the House, urged this new plan as follows:

“A general revision of the laws has just taken effect. This revision is the product of four years of labor at an expenditure of nearly half a million dollars. The work has been well done. At a time when these new general laws have not yet been fully printed and distributed we might well refrain from all amendments which are not absolutely vital to the safety or welfare of the Commonwealth.

Let us govern our work so that never again will a general consolidation and rearrangement of the laws become necessary. If all bills are enacted in proper form

we can make possible a continuing, annual revision, inexpensive and convenient. Adequate quarters and facilities have been provided for the legal counsel who advise the committees in the drafting of legislation. This will involve a slight additional expense, negligible however when compared with the cost of periodic general revisions, a cost which can thus be obviated for the future. And we can bring to every court and law office in the state an incalculable saving of time, trouble and expense. I do not at this time suggest any changes in the rules to accomplish this result. Experience will show what may be needed. I do, however, request that committees, before reporting bills to the House or Senate, have them properly drawn and approved as to form and legality by the counsel to committees. This work, heretofore done in part by the Committee on Bills in the Third Reading, should be accomplished in the first stage of legislative progress."

At the opening of the session of 1922 the Speaker of the House referred again to this same subject as follows:

"Carrying out the suggestion made a year ago, all general laws passed at the last session were enacted in the form of amendments of or additions to the recent consolidation. If this custom is continued, as it should be, there will always be available one official compilation of all statutes of general application. This compilation can be reprinted at periodic intervals for the convenience of the bench and bar; but never again will a general revision be required. Thus will the danger of unintentional changes or omissions in the statutes be avoided and the Commonwealth never again be required to assume the expense, inconvenience and delay of a general revision of the laws. The standard, set in this regard by the General Court of 1921, will ever remain one of its most substantial achievements."

As the suggestion of "continuous consolidation" has been somewhat misunderstood, a brief explanation should be made. There is no intention of printing each year a new revision

of the General Laws, nor is there any idea of abandoning the established Massachusetts custom of publishing from time to time a re-codification of all general statutes. The plan is that every act of general application—excluding, of course, all acts and resolves of local application or merely of temporary effect—shall be enacted as an amendment of or addition to the General Laws of 1921. This plan was carried out to the letter during the last session. Every general act of 1921 can be clipped from the blue book and inserted in its proper final location among the General Laws as printed. In former years general acts were often passed without reference to existing statutes which related to the same subject matter and without specific repeal of conflicting statutes. In fact it was often difficult to decide whether or not a repeal of existing statutory provisions was intended. The existence in the several blue books of many statutes, not codified or co-ordinated with the Revised Laws of 1902 and often containing conflicting provisions, made the task of consolidation and arrangement one of real difficulty. Such a state of affairs should not be permitted to recur. It is conceivable that the passage of an act might be desired reorganizing the state government which would, if the new plan were to be carried out, involve the amendment of so many sections of the General Laws that its correct preparation would not be possible during the limited time of a legislative session. If this did occur and such an act pass, thus breaking down the plan, the necessary work should be done during the summer recess and a new amending act passed at the beginning of the next session which would correct every section affected by the former act.

It may be a surprise to many lawyers to learn that the General Court has already provided adequate facilities for doing this work. At the extra session of 1920, called for the purpose of adopting the General Laws, the General Court enacted Chapter 640 of the Acts of last year entitled "An Act to provide for the continuous consolidation of the General Laws." This act now appears as Sections 51 to 55, inclusive, of Chapter 3 of the General Laws. Provision is made therein for the appointment of permanent counsel to the Senate and House of Representatives. The law provides that said counsel shall "annually prepare a table of changes

in the general statutes, an index to the acts and resolves, and shall from time to time. . . . consolidate and incorporate in the General Laws all new general statutes. . . . shall assist members and committees of the Senate and House of Representatives in drafting bills . . . shall so far as possible draft all bills proposed for legislation as general statutes in the form of specific amendments of or additions to the General Laws. . . . may from time to time submit to the General Court such proposed changes or corrections in the general statutes as they deem necessary or advisable. . . . shall as early as practicable after prorogation file in the office of the state secretary a copy of all amendments of and additions to the General Laws, which shall be open to public inspection."

These new offices are held by Mr. William E. Dorman, Counsel to the Senate, and Mr. Henry D. Wiggin, Jr., Counsel to the House of Representatives. Mr. Dorman, a graduate of Harvard College 1898 and Harvard Law School 1901, served in the House of Representatives in 1907, 1908, and 1909 and was in 1915 appointed as Counsel to Senate Committees, a position somewhat similar to that which he now holds, by the Honorable Calvin Coolidge at that time President of the Senate. Mr. Henry D. Wiggin, Jr., a graduate of Harvard College 1900, and Harvard Law School 1902, was for more than three years associated with the Commissioners during the recent consolidation, and was recommended to the Speaker by the Commissioners for appointment to this new office. It is expected that in future years these legislative counsel will be able to do all the legal work necessary for recess committees and commissions which in the past have frequently been obliged to retain the services of outside lawyers. The writer expects that during the present session an act will be passed requiring all heads of departments and other public officials to submit their recommendations for legislation to the Senate and House Counsel before December 1, and obtain their approval as to matters of form and phraseology.

The writer knows from experience the difficulties of a general consolidation. His service in the House of Representatives from 1916 to date, covers the entire period of the re-arrangement of the General Laws. Together with former

Senator Augustus P. Loring and former Representative Essex S. Abbott, he served on the committee of three established by Chapter 86 of the Resolves of 1920 to take over the work of the Commissioners and to prepare the revision of the General Laws for final printing and distribution. He most earnestly suggests that the members of the Bar cooperate with the plan for continuous consolidation. All new legislation suggested by the Bar Association or by interested individuals should be originally drafted in such form and with such notations of chapter and section that if passed it would automatically take its proper place in the General Laws.

No general consolidation should ever be needed in the future. At convenient intervals of ten years or thereabouts, the official copy of the laws corrected each year by the Counsel to the Senate and House of Representatives, with a permanent index also corrected to date, can be issued at comparatively slight expense to the Commonwealth and with little delay or inconvenience to members of the Bench and Bar. If the plan suggested is carried through successfully, the General Courts of 1920 and 1921 will have to their credit a substantial and permanent improvement in legislative method—an important step forward in the mechanics of lawmaking.

**WHY NOT A LOOSE LEAF EDITION OF THE GENERAL LAWS WITH ANNUAL NEW PAGES—A SUGGESTION FOR CONVENIENCE WHILE THE TYPE IS STILL STANDING.**

The foregoing article by the Speaker of the House explains a distinct advance which has been made in legislative practice. Can we not go still further and add to the edition of bound volumes of the General Laws and of the annual Blue Books, which are to be issued and which are needed for constant use, a loose leaf edition to be issued at a reasonable price for those who wish one?

There seems to be no reason as the state has the plates for the General Laws why such a loose leaf edition could not be arranged for now and thus enable those who wish to have one in their offices to get it. Thereafter, the additional pages for such an edition containing the annual consolidated sections could be printed and distributed so that libraries and courts and those members of the bar who wished for one could have an up-to-date volume of the General Laws in addition to the key volume at the State House which is described in the foregoing article by Mr. Young. Such an edition thus kept up might be of great convenience, even although the annual consolidation work described by Mr. Young did not receive the formal confirmation of legislative action. Whether it would be advisable that the practice of such annual confirmation should grow up is a question which probably would answer itself in time. It need not be discussed now.

The only purpose of the present note is to suggest that since we have the plates from which to print, the courts, the bar, the legislature, and the public should be given the benefit of the opportunity by making it possible for those who wish it to obtain a copy of a loose leaf edition. The art of loose leaf binding has now advanced to a point in which loose leaf books can be prepared with little danger of tearing of the pages, even when they are in constant use.

It is suggested that those members of the bar who favor such a plan as likely to prove convenient communicate promptly with Hon. Benjamin Loring Young, Speaker, House of Representatives, State House.

F. W. G.

## THE ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE UNDER THE CONSTITUTION OF MASSACHUSETTS.

The right to vote was conferred upon women by the Nineteenth Amendment to the Constitution of the United States, which provided as follows:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. Congress shall have power to enforce this Article by appropriate legislation.”

As was said in the Opinion of the Justices of the Supreme Judicial Court, rendered March 31, 1921, 237 Mass. 591, “the adoption of this amendment by its inherent force struck from the Constitution of this Commonwealth the word ‘male’ wherever it occurred as a limitation upon the right of the citizen to vote.”

The incidental effect of this amendment has been a matter of some doubt. One of the principal questions is, whether as a consequence women are now entitled generally to hold public office in this Commonwealth. This question is one of the State Constitution and State Law, and in order to remove the doubt so far as the Legislature had power to remove it, it was enacted at the session of the General Court of 1921 as follows:

“Women shall be eligible to election or appointment to all state offices, positions, appointments and employments except those from which they may be excluded by the Constitution of the Commonwealth. . . .”

Statute 1921, Chap. 449, Sec. 3.

The same statute made similar provision in Section 4, with respect to county officers.

The practical result of this statute was merely to emphasize the doubt. Entirely apart from the question of the



desirability of the election or appointment of women to public office — a matter as to which there may be varying views according to varying circumstances in connection with different offices — it cannot be doubted that the principal question of law is one of public importance, which should be authoritatively settled without delay. In the case of elective offices in particular, the period allotted to a political campaign does not permit a final decision in a litigated case until the question has ceased to be material, and officers in charge of nominations and elections are forced to act without any certain guide. The Governor has wisely recommended that an opinion be requested of the Justices of the Supreme Judicial Court, by whom alone the question can be determined. The General Court, however, has before it various bills which involve the subject, and the following brief review and discussion of the principles involved is presented<sup>1</sup> in the hope that it may prove of some assistance to those charged with their consideration.<sup>2</sup>

The Attorney-General of the Commonwealth in an opinion given July 20, 1921, has advised that women are excluded by the Constitution from election as representatives to the General Court. The Supreme Court of Maine, on the other hand, has reached a contrary conclusion as to all Constitutional offices, under a Constitution which does not differ materially from ours. Opinion of the Justices, 113 Atl. Rep. 614; 119 Maine, 603.<sup>3</sup>

Prior to the Nineteenth Amendment it was the view of our Supreme Judicial Court that women were excluded from holding any Constitutional office. This conclusion had been expressly reached only with respect to the offices of Justice of the Peace and Notary Public, but the reasoning of the

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<sup>1</sup>I wish to express my obligation to Myer Israel, Esq., of the Suffolk Bar, without whose aid, particularly in the matter of historical research, this paper could not have been written.

<sup>2</sup>This discussion is concerned only with constitutional offices. As to offices created wholly by the Legislature there can be no doubt that the Legislature has full power to define the qualifications as it sees fit—a principle which furnished one ground for the Opinion of the Justices holding that women could serve on school committees. 115 Mass. 602.

<sup>3</sup>A similar conclusion is reached by the Attorney-General of Pennsylvania with reference to the eligibility of women under the Constitution of that State for the office of Clerk of Courts of County Sessions. December 22, 1920.

Court would doubtless have applied to all Constitutional offices.<sup>4</sup>

The Nineteenth Amendment of course said nothing about the right of women to hold office. If, therefore, the Constitutional disqualification was of so fixed a character that it remained unchanged regardless of changes in the political status of women, or if the changes in their political status were insufficient to result in a change in this particular, then the Constitutional disqualification remained, and the Attorney-General was perfectly right in his opinion.

The view that the Constitutional disqualification was of so fixed a character that it must remain unaltered by subsequent changes in the political system is one not lightly to be adopted. A Constitution may best serve its purpose of preserving and maintaining the fundamental rights and liberties of the people by being so framed and so construed that its provisions shall be fundamental and general, unhampered by too rigid connection with conditions which may be temporary or accidental.<sup>4</sup>"A" An implied limitation — and we are here dealing wholly with an implied provision — may doubtless result from facts and conditions existing when the Constitution was framed, but such a provision may be affected both by subsequent changes in the frame of the Constitution, and by changes in the facts and conditions to which it may be supposed to apply. It would be a short-sighted view of an implied limitation to hold that it imposes a specific implication applying for all time to a specific state of facts, rather than a general implication, applying to a subsequent state of facts only so far as required by the general principle upon which the implication is based.

The Supreme Judicial Court followed the wise and statesmanlike course in dealing with the State Constitution in connection with the implied disqualification of women as jurors.

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\*Opinion of the Justices, 165 Mass. 599.

Opinion of the Justices, 150 Mass. 586.

Opinion of the Justices, 107 Mass. 604.

See also Opinion of the Justices, 160 Mass. 586.

Opinion of the Justices, 122 Mass. 594.

Opinion of the Justices, 115 Mass. 602.

Robinson's Case, 131 Mass. 376.

"A": "We must never forget," said Chief Justice Marshall, "that it is a constitution we are expounding." *M'Culloch v. Maryland*, 4 Wheat, 316, 407. See also *Legal Tender Case* 110 U. S. 421, 439; *Marcus Brown Holding Company v. Feldman*, 269 Fed. 306, 315.

Opinion of the Justices, March 31, 1921, House Document No. 1477; 237 Mass. 591. This disqualification was held to have resulted from the political status of women previously existing, and to have ceased when women received the suffrage. From a historical review of the situation the Justices concluded that "it is a constituent element of the trial by jury preserved by the Constitution that jurors be selected from the body of the electorate"; that no other particular provision relative to the qualifications of jurors was made by the Constitution; and that "a change by an amendment to the Constitution in the qualifications of the electorate such as that wrought by the Nineteenth Amendment by its own force authorizes the General Court to make a corresponding change in the qualifications of jurors."

Of course jurors are not public officers in the strict sense; they are citizens drafted for a public service; and the reasoning of this opinion does not apply to public officers without some modification. The opinion nevertheless establishes that there may be a Constitutional disqualification, or a disqualification resulting from a principle implied in the Constitution, which ceases to exist or to apply upon the subsequent change of the Constitution in a particular upon which the implication, or its application, was based. Perhaps the result is to be reached by holding that there never was a Constitutional disqualification of women as such, but rather an implied general principle excluding from jury service all persons not full members of the electorate.

A further question is suggested by the opinion, as to whether the termination of such a disqualification is automatic, or whether further legislation by the General Court is required or permitted. This question I shall postpone for the moment, and shall first consider the effect of the suffrage amendment upon the right of women to hold office under the Constitution itself.

The important inquiry is one of historical fact: How far are the right to vote and the right to hold public office inter-related, and how far does the one necessarily follow from the other? The Attorney-General assumes that the two are totally distinct. The Supreme Court of Maine holds that the right to hold public office is necessarily implied from the right to vote. The true answer must depend upon a his-

torical review of political institutions in Massachusetts, as to which I can attempt merely a summary.

The rights of women at common law are thus stated in Robinson's Case, 131 Mass. 376, 377:

"By the law of England, which was our law from the first settlement of the country until the American Revolution, the Crown, with all its inherent rights and prerogatives, might indeed descend to a woman or to an infant; but, under the degree of a queen, no woman, married or unmarried, could take part in the government of the state. Women could not sit in the House of Commons or the House of Lords, nor vote for members of Parliament, 4 Inst. 5. *Countess of Rutland's case*, 6 Rep. 52 b. *Chorlton v. Lings*, L. R. 4 C. P. 374, 391, 392. They could not take part in the administration of justice, either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy. 2 Inst. 119, 121. 3 Bl. Com. 362. 4 Bl. Com. 395. Willes, J., in L. R. 4 C. P. 390, 391. And no case is known in which a woman was admitted to practice as an attorney, solicitor or barrister."

The common law, however, is of little aid in the present discussion, except as modified by the doctrine and usage of Colonial and Provincial days. In England, even an approximation of universal male suffrage was not achieved until the Reform Bill of 1832, and the common law of England relating to the eligibility of women for public office had long crystallized on wholly independent grounds.

From the earliest Colonial days, both in the Plymouth Colony and the Massachusetts Bay Colony, the right to vote and the right to hold public office were fundamental and inseparable rights of all freemen.<sup>5</sup> These rights resulted

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<sup>5</sup>The following publications may be referred to for the Colonial and Provincial laws: Shurtleff, Records of Massachusetts (1628-1686) in five volumes; Ancient Charters, Colonial laws and Province laws of Massachusetts Bay, published by order of the General Court, Boston, 1814; Brigham, The Compact, with the Charter and Laws of the Colony of New Plymouth, Boston, 1836; Bradford's History of Plymouth Plantation; Louis A. Frothingham, A Brief History of the Constitution and Government of Massachusetts, 1916; Hazard, Historical Collections, 1794; Shurtleff and Pulsifer, Records of Plymouth Colony, Boston, 1855-1861.

The three publications first referred to have been selected for purposes of citation, and will be cited in abbreviated form as follows: Shurtleff, Records; Ancient Charters; Brigham, Compact.

automatically from the fact of full membership in the self-governing body. The freeman, admitted as such to the governing society, was the franchised man. He alone could vote for the higher offices, and he alone (with exceptions only in case of minor offices) could hold public office.<sup>6</sup>

In 1636 the freemen of Newbury were fined by the General Court of Massachusetts for choosing and sending to "This Court" a deputy "which was noe 'freeman'."<sup>7</sup>

The freemen in the Massachusetts Bay Colony determined for themselves the qualifications of their own membership, and these qualifications were in part property qualifications and in part religious qualifications.<sup>8</sup>

Occasional restrictions on the right of freemen to hold office were attempted, as in the law enacted in 1663 excluding from the office of Deputy to the General Court attorneys practising in inferior courts, and a law which apparently remained in force until 1664, excluding from the chief civil offices all persons not "members of our churches."<sup>8</sup>

These restrictions appear, however, to have been incidental and did not impair the general recognition of the fundamental rights of freemen.

As the colony became more complex, town government developed, and the right to vote for local offices and the right to hold local offices were extended to non-freemen having qualifications somewhat similar to those of freemen, and in similar manner non-freemen having a vote in town affairs became eligible for jury duty.<sup>9</sup>

No one but a freeman, however, could ever vote for, or be elected, deputy or any other chief general officer in the Massachusetts Bay Colony.

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<sup>6</sup>Brigham, Compact, 37, 42, 156, 241, 256 ff.; Proceedings of the General Court of New Plymouth, November 15, 1636, June, 1638, July, 1669, General Laws (1671), Chap. I, Sec. 1., Chap. V, Title I, Secs. 1, 2, 3, 5, 6, 7, Title III, Sec. 1; Ancient Charters, 8, 9, 10, 105-109; Colony Charter of 1628; General Laws, Chap. XL; 1 Shurtleff Records, 118, 161, 174, 188; Proceedings of General Court of Massachusetts Bay, May 14, 1636, September 3, 1635, May 25, 1636, March 9, 1637.

<sup>7</sup>1 Shurtleff Records, 174; Proceedings of the General Court, May 25, 1636.

<sup>8</sup>Ancient Charters, 9; Colony Charter of 1628; 1 Shurtleff Records, 87; Proceedings of General Court, May 18, 1631; 4 Shurtleff Records, Part II, 87, 117, 118, 221; Proceedings of General Court, October 20, 1663, August 3, 1664. May Session, 1665.

<sup>9</sup>3 Shurtleff Records, 109; Proceedings of General Court, May 26, 1647; 5 Shurtleff Records, 306; Proceedings of General Court, March 16, 1681; Ancient Charters, 195, 196; General Laws (1670) Chap. XCVI, Sec. IV.

A significant characteristic of many of these Colonial laws is that the right to vote and the right to be elected are often referred to in the same law, and often in the same sentence or phrase, as if the two were interdependent.<sup>10</sup>

The situation in the Plymouth Colony was, with slight variation, the same. The freeman was the franchised man. He alone could vote for the higher offices; and no further qualification for office was required except that the officer be a freeman.<sup>11</sup>

The principal differences between the two colonies are that at Plymouth the right to vote for deputies was extended to non-freemen having qualifications similar to those of freemen, but that even in local town government, non-freemen could not hold the office of Selectman, although if duly qualified they were given the right to vote. Non-freemen were, however, eligible as jurors, constables and perhaps other minor offices.<sup>12</sup>

The variations from the central conception appear to have been as unimportant at Plymouth as at Massachusetts Bay. At both colonies the government was by the freemen, who held the right to vote and to hold office by reason of their membership in their self-governing society. It is in the local town governments of Massachusetts Bay that we find the clearest indication of the transition from government by the body of freemen to government by all the duly qualified inhabitants, and here we find that the right to vote for local office and the right to hold office go hand in hand. The familiar conception of government continues; the qualified inhabitants of the town are becoming in substance if not in form the freemen of their town with all the recognized rights incident thereto.

In 1691, the Massachusetts Bay Colony and the Plymouth Colony, together with the Province of Maine and certain territory lying farther east, were united as the "Province of Massachusetts Bay" under a Crown Charter much less liberal

<sup>10</sup>Shurtleff Records, Vol. 3, 109, Vol. 4, Part II, 221; Vol. 5, 306; Proceedings of General Court, May 26, 1647, May Session, 1665, March 16, 1681; Ancient Charters, 195-196; General Laws (1670) Chap. XCVI, Sec. IV.

<sup>11</sup>Brigham, Compact, 37, 63, 93, 157, 159, 229; Proceedings of General Court, November 15, 1636, June, 1638, June, 1651.

<sup>12</sup>Brigham, Compact, 42, 63, 138, 139, 256 ff.; Proceedings of General Court, November 15, 1636, June, 1638, June, 1662; General Laws (1671) Chap. V, Title I, Sec. VI, Title III, Sec. I, Chap. VI, Chap. VII.

than the previous Colony Charter of Massachusetts Bay. The significance of the provincial period is greatly diminished by the fact that the qualifications of officers and electors are largely controlled by the strict terms of the charter superimposed by the Crown.<sup>13</sup>

By the charter the higher offices are now appointed by the Crown. The most important office elected by popular vote is that of deputy to the General Court, who must be a freeholder "from time to time elected or deputed by the major part of the freeholders and other Inhabitants of the respective towns or places." But no one may vote for deputy who has not a freehold estate of the value of forty shillings or other estate to the value of forty pounds sterling.

The twenty-eight counsellors or assistants are chosen by the General Court from "the inhabitants or proprietors of land within" the various territories.

The term freeman has now disappeared. The successors of the freemen are now a larger group known as "Inhabitants." It is not believed, however, that the charter destroyed the general theory of government of the colonists or that the inhabitants were not still regarded, broadly speaking, as members of a self-governing society, exercising their full rights of membership as theretofore practised to the fullest extent permitted by the Crown and by the charter.

The charter allowed little latitude for legislation as to qualifications either for charter offices or for electors having the right to vote under the charter.

In 1692 it was enacted that no one should be chosen as juror who had not a freehold worth forty shillings or other estate worth fifty pounds—a provision almost identical with the charter qualifications of voters for deputies.<sup>14</sup>

In the same year a slightly lower property qualification was provided for voters for the election of selectmen and other town officers, and this provision was continued and regulated by subsequent legislation.<sup>15</sup>

Certain officers such as highway surveyors and commis-

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<sup>13</sup>Ancient Charters, 27 ff. Charter.

<sup>14</sup>Ancient Charters, 221; Province Laws, Chap. I, Sec. VIII (1692).

<sup>15</sup>Ancient Charters, 248, 544, 545; Province Laws, Chap. XV, Sec. IV (1692), Chap. CCXIX, Sec. I, Sec. IV (1742).

sioners authorized to hold a Court of Chancery, were required to be freeholders.<sup>16</sup>

As to many other minor offices it is provided only that the incumbents shall be "able and discreet" or "fit" or "meet" persons.<sup>17</sup>

Under the charter itself no special qualifications were required of officers appointed by the General Court or by the Governor.

During the provincial period it is apparent that the practice with respect to voters, and the practice with respect to office holders did not precisely correspond in the matter of property qualifications. Subject to any variation in property qualifications, however, it cannot be doubted that all of the inhabitants as members of the political community retained the traditions of freemen and asserted the equal right to vote and to hold office so far as permitted by the Crown.

When the Constitution of Massachusetts was framed the freemen of earlier days had long since disappeared. The body politic had become the "Inhabitants" or "People" of the entire Commonwealth. The conception, however, of the "Inhabitants" as a self-governing political body remained, and no aliens were admitted to their numbers. As was said in an Opinion of the Justices, 7 Mass. 523, 525, "As the supreme power rests wholly in the citizens, so the exercise of any branch of it ought not to be delegated by any but citizens, and only to citizens." Or, as said in a later opinion, "The electors and elected alike must be citizens of the Commonwealth." Opinion of the Justices, 122 Mass. 594, 595. And the word "Inhabitants" in the original Constitution was construed accordingly.

Without quoting at length the various clauses of the "Declaration of the Rights of the Inhabitants," which forms the first part of our Constitution, we may note that the people are declared to have "the sole and exclusive right of governing themselves"; that all power resides originally in the people and is derived from them, that their magis-

<sup>16</sup>Ancient Charters 267, 275; Province Laws, Chap. XXIII, Sec. 1 (1693), Chap. XXVI, Sec. II (1693).

<sup>17</sup>Ancient Charters, 270, 332; Province Laws, Chap. XXIV, Sec. I (1693), Chap. LXI, Sec. V (1699).



trates are their substitutes and agents, accountable to them; and that the people have the right, in such manner as they may establish by their frame of government, "to cause their public officers to return to private life." All these provisions appear to contemplate that the inhabitants are governed by persons chosen from among themselves, and without higher or different fundamental qualifications. Articles IV, V, VIII.

Particularly significant are the provisions of Article IX, that "All the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

Here the rights of electing and being elected are stated as equal, and the same assumption appears in the provisions of Part II, Chap. I, Sec. II, Art. II: "And to remove all doubts concerning the meaning of the word 'inhabitant' in this Constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this state, in that town, district or plantation in which he dwelleth or hath his home."

On the other hand, property qualifications were prescribed for electors, with higher property qualifications for Governor, Lieutenant-Governor, Senators and Representatives. For these officers there were other varying requirements as to length of residence, and a requirement as to the Governor and Lieutenant-Governor that they should declare themselves to be of the Christian religion. Part II, Chap. I, Sec. II, Act V, Sec. III, Art. III; Chap. II, Sec. I, Art. II, Sec. II, Art. I.

The right to vote for Senators was conferred upon "the freeholders and other inhabitants of this Commonwealth qualified as in this Constitution is provided"; Part II, Chap. I, Sec. II, Art. I; the right to vote for representatives was conferred upon "every male person being twenty-one years of age" with certain qualifications as to property and length of residence. Part II, Chap. I, Sec. III, Art. IV. The qualifications of electors for Governor and Lieutenant-Governor were the same as in the case of Senators and Representatives. Part II, Chap. II, Sec. I, Art. III, Sec. II, Art. I.

The property qualifications of electors and of officers were early abolished, and with them disappear the last substantial distinctions in the qualifications of voters and of public officers. Amendments III, XX, XXIII, XXXII, XXXIV.

Two other amendments may be referred to (both subsequently altered) in which a literacy test and a naturalization provision were added as conditions both of the right to vote and of the right to hold office. Amendments XX, XXIII.

It cannot be denied that a perfectly tenable argument may be made to the effect that the right to vote, although closely connected with other political rights, was a separate and distinct right, and that no one of the various political rights followed from the other as a necessary consequence. Some support for this argument may be gained from the practice during the provincial period, and from the provisions of the original Constitution itself, prescribing higher property qualifications for certain offices than for electors.

More in accord with the conception of the body politic as a society of citizens possessing full political rights except in so far as they themselves may have submitted to a limitation, is the view that the right to vote and the right to hold office are alike the rights of all citizens, not as separate and distinct rights, but as manifestations or incidents of their membership in the body politic. Such was clearly the conception of the rights of the freeman of colonial days. Such is undoubtedly the present day conception of the rights of all the people under our "government of the people, by the people, and for the people." And such, it is believed, was the conception of the rights of the Inhabitants when the Constitution was framed. The inhabitants or citizens had fundamentally complete rights of membership in the body politic, with all the incidents of membership, which rights remained ready to assert themselves in their fullness the moment any disqualification to which the people had submitted themselves should be removed.

Even under this view it may of course be urged that the right to vote was merely one incident of full political rights, and that a grant of the right to vote does not confer that complete membership in the body politic of which all other political rights are incidents. This argument, however, fails to recognize the dominating power of this incident, which

was in truth the most fundamental manifestation of full political rights. It is hardly conceivable that the grant of so fundamental a right in connection with a public corporation or body politic should not import a grant of full membership in that body.

To put the case from a slightly different angle, women have always been at least qualified members of the body politic. They have always been citizens. They are full members of the body politic except as limited by the Constitution. Their one express disqualification has been from voting, and this disqualification has now been removed. Their full political rights may therefore assert themselves, except in so far as some implied disqualification persists.

We may now turn to a brief consideration of the opinions of the Supreme Judicial Court dealing with the right of women to hold office under the Constitution with a view to determining how far their disqualification is absolute, and how far the implied Constitutional provision is susceptible of interpretation similar to that adopted with respect to women as jurors.

These opinions have dealt expressly with the eligibility of women for appointment as Justice of the Peace and Notary Public.<sup>18</sup>

The office of Justice of the Peace is treated in these opinions as a judicial office. The office of Notary Public, while not a judicial office, is nevertheless a Constitutional office. The conclusion that women were disqualified under the Constitution is said to result from the law of Massachusetts when the Constitution was framed, from the whole frame and purport of the instrument itself, from the history and nature of the office, and from universal understanding and unbroken practical construction and usage. These reasons are equally applicable to Constitutional elective offices. They are applicable, with very slight modification, to the position of jurors.

The frame and purport of the Constitution itself have now been changed by Constitutional amendment. The other considerations, such as the law of Massachusetts when the Con-

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<sup>18</sup>Opinion of the Justices, 107 Mass. 604.

Opinion of the Justices, 150 Mass. 586.

Opinion of the Justices, 165 Mass. 599.

stitution was framed, and considerations of history and usage, are no more conclusive in the light of the Constitutional amendment than in the case of jurors. So far as the nature of the various civil offices at the present day is concerned, it can hardly be held under present conditions that there is any civil office which a woman, if otherwise qualified and duly appointed or elected, is, as a matter of law, incompetent to fill.

The better view would seem to be that the implication of a Constitutional disqualification of women for public office, and the considerations upon which it was based, were founded mainly if not wholly upon the assumption that women were not full members of the body politic and were expressly debarred from voting. This view was probably reinforced by the common law limitation of women's civil rights and their supposed domination by their husbands. The civil disabilities of women have long since disappeared, and, if the view is correct that they are now full members of the body politic, with all the rights incident thereto, except in so far as an implied Constitutional disqualification persists, there remains no basis for the implied disqualification. Perhaps the implied Constitutional provision may be more accurately stated, not as a disqualification of women as such, but of all persons not full members of the body politic and not entitled to vote.

It is believed that the opinions of the Supreme Judicial Court should not be interpreted as having held that a specific provision was implied in the Constitution in so many words that "women shall be disqualified from holding public office," and any such decision would hardly have comported with sound methods of interpretation of so fundamental an instrument as a Constitution. What has been held is that there has existed by implication in the Constitution a general principle which would be violated under existing conditions by the appointment of a woman to a Constitutional office. It may well be held under present conditions that there is no principle implied in the Constitution which would now be so violated.

It is true that the opinions relating to Justices of the Peace and other appointive offices have not been expressly based upon the absence of voting rights. Nevertheless the

part which women may take in the government has been referred to and relied on, and the underlying effect of woman's political status cannot have failed to be controlling. It is very unlikely that the Court would have reached the conclusion which was reached if women had then possessed full voting rights; for even in Colonial days only a full free-man could vote for all the chief officers.

To recur to the Opinion of the Justices dealing with the eligibility of women for service as jurors, the conclusions there reached may be paraphrased, with slight modification, as applying to all Constitutional offices. It is a constituent part of the qualifications of those holding office under the Constitution that they be chosen from the body of the electorate. There is at the present day no higher qualification for officers than there is for voters, and while during the provincial period and under the Constitution as originally framed, certain property qualifications were required higher than those required of the electors, these qualifications were not of such a character as to impair the fundamental conception that all electors were potentially qualified to hold public office. It follows therefore that a change by an amendment to the Constitution in the qualifications of the electorate, such as that wrought by the Nineteenth Amendment, by its own force authorizes the appointing or electing power to appoint or elect women to public office under the Constitution.

If there is any distinction between the various offices the strongest cases in favor of the rights of women are the cases of elective offices, for, as has already been pointed out, the Declaration of Rights confirms to the inhabitants their equal right to elect officers and to be elected for public employments, as if the two rights were interdependent.

If it should be determined that the Constitutional disqualification of women for public office no longer exists, the question arises whether legislation is required in order that their rights may become effective.

In the Opinion of the Justices, 165 Mass. 599, 601, it is said: "If the qualifications for the office are prescribed by the Constitution the Legislature can not change them. If the qualifications are not prescribed by the Constitution, although the tenure and mode of appointment are, there

has been some question whether the Legislature can prescribe the qualifications. But the solution of this question in any particular case depends upon the construction of the particular clauses of the Constitution involved, as well as the whole frame and purport of the Constitution."

If by reason of the Nineteenth Amendment the Constitutional disqualification is merely removed, it might be contended that the qualifications of public officers remain not specifically provided for, and that the Legislature may control the extension to women of the right to hold public office. Such a conclusion is not to be anticipated. The character of the change is one which should be made, if at all, by interpretation of the Constitution itself. The entire frame of our government imports as a necessary inference that all citizens of full age, not otherwise disqualified by the Constitution, shall have the right to hold public office, and if the disqualification is removed from a group of citizens in other respects possessing full political rights, the extension of the right to hold office should be automatic by force of the Constitution itself. If, on the other hand, the Constitutional disqualification of a group of citizens imposed by the Constitution itself is not fully removed by express or implied change in the Constitution itself, its removal can hardly be permitted in the exercise of any powers which the Legislature may have over the qualifications of public officers. In the case of jurors, where the manner of selection has always been regulated by legislation, further legislation was naturally held to be required. Similar considerations would apply to military service in case it should be held — as is perfectly possible — that women were now liable for such service. In the case of elective or appointive offices however, no legislation is required. While there appear to be no Constitutional qualifications except as to literacy and length of residence, and the requirement of citizenship, the electors on the one hand and the appointing power on the other have no need of legislative aid.

As to the offices of Governor and Lieutenant-Governor and other elective state offices, the voters appear to be the sole judges of qualifications. As to members of the General Court, each branch is sole judge of the qualifications of its members. As to judicial and other Constitutional ap-

pointive offices, the appointing power appears to be the sole judge of the qualifications.

With respect to all such offices the change, if it has taken place, is automatic and requires no legislation. The only legislation required, therefore, is in case of provisions of the statutes governing the details of election or appointment to office, such as the primary and election laws, as to which care should be taken that provisions are not permitted to remain on the books which may be construed as limited to men, in accordance with the law in force at the time they were enacted. If in the course of such legislation the Legislature should go beyond the strict necessities and declare the rights already confirmed to women by interpretation of the Constitution itself, there appears to be no substantial objection to so doing, and such declaratory provisions would be of service for the information of persons charged with the duty of administering the law.

One word should be said in conclusion as to the special aspect in which the main question is presented in connection with the eligibility of women as members of the General Court. "The Senate shall be the final judge of the elections, returns and qualifications of their own members, as pointed out in the Constitution." "The House of Representatives shall be the judge of the returns, elections and qualifications of its own members, as pointed out in the Constitution." Constitution Part II, Chap. I, Sec. II; Art. IV., Sect. III, Art. X. As the Supreme Judicial Court has said, the power of either branch of the Legislature to be the judges as to their own members is not limited to the particulars enumerated. "They are judges in other respects, in all respects." *Hiss v. Bartlett*, 3 Gray, 468, 472, 475. Their decision expelling a member cannot be scrutinized or reviewed by the courts. Their decision is conclusive. In like manner it must be deemed that their decision admitting a woman as a member, or refusing such admission, or in any manner determining the qualifications of a member, is conclusive both as to matter of fact and matter of law. On similar grounds, the Attorney-General has given as his opinion that women may be elected members of Congress because Congress has so determined. Each branch of the General Court may determine for themselves whether

women may be elected to membership; and upon this particular point the opinion of the Justices of the Supreme Judicial Court, if asked for at this time, would be advisory as to a question which they may never have occasion or jurisdiction to consider and determine for the purpose of a strictly judicial decision, and upon which a decision by the appropriate branch of the General Court would be controlling. The responsibility for a final decision rests upon each branch of the Legislature, and the decision of either branch could be manifested by standing rule as well as by action in a particular case. The desirability, however, of maintaining a practice which shall preserve uniformity in this respect among elective offices will doubtless be generally recognized by both branches of the General Court.

JOHN G. PALFREY.



## CONSTITUTIONAL THINKING NEEDED FROM WOMEN LAWYERS.

The proposed new feminine amendment to the Constitution of the United States which has not yet apparently been submitted to Congress, but which is the subject of vigorous controversy among women's organizations, shows the immediate need of sound constitutional thinking from the women lawyers of Massachusetts and of every other state in the Union. The practical situation appears from the following brief extracts from an article by John Walker Harrington in *The New York Times* of January 22, 1922:

"Now for the suffrage war after the suffrage war. While thousands of conservative women protest against the launching of a new and extreme equal rights amendment, the radicals, led by the National Woman's Party, are championing it for all they are worth. In the fight the National Woman's Party is headed by Miss Alice Paul, Vice-President, in the absence of Mrs. O. H. P. Belmont, the President.

Although on the face of it the proposed amendment looks innocent enough, there are economists and thinkers who believe that it will work incalculable harm to women themselves. Woman, who hitherto has been exempt from many disagreeable things, and has had tender treatment on account of physical constitution, is likely to be deprived of these freely accorded privileges if she attempts to take too much in straining for a literal equality. Of course, at this present writing (Jan. 18) the bill calling for the amendment to the national Constitution has not been offered, but it is likely to be put on the legislative ways at any time.

Here is the latest form of the fateful group of sentences which they who would press on to 'complete suffrage victory,' as they call it, would have incorporated with the Nineteenth Amendment that was hailed as the palladium of women's rights.

Section 1. No political, civil or legal disabilities or inequalities on account of sex, or on account of marriage,

unless applying alike to both sexes, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

At first glance it would seem that the proposed amendment would have to do only with such material things as houses and lots and dowers. But on the second thought, numerous organizations of women have risen with one accord and disapproved.

Among them is the National Consumers' League, which for thirty years has fought to give woman certain privileges and exemptions in the industries because of her physique and of her obligations to posterity. The organization has issued a brief prepared by its well-known leader, Mrs. Florence Kelly, with the assistance of Felix Frankfurter of Harvard University and of Bernard Shientag of this city, who has been counsel to the United States Department of Labor. . . ."

If we are to keep on amending the Constitution of the United States to accommodate the ideas of every reformer and theorist about society and government, male or female, we are likely to find that the "uplift" movement upon which we have started consists of lifting ourselves by our boot straps. Instead of the balanced dual form of government established by the Federal Constitution, the basis of which was the principle of local self-government which has given us forty-eight separate laboratories in which to try experiments instead of all making our mistakes together at the same time, we shall have a hopeless mess.

The proposed women's rights amendment was discussed recently by Professor Ernst Freund, (Am. Bar Assoc. Journal, Dec., 1921, p. 658). He concludes: "The Constitution is not a fit instrument to reform complex civil relations. It can proclaim a principle of equality, but it ought to leave it to the legislature to work it out."

Another practical discussion on this subject is in the February number of the same Journal, pages 105-107, entitled "Statutory Changes in the Legal Status of Women." This concludes: "Whatever may be the opinion as to the advis-

ability of a blanket bill in the states, the differences in the several states in respect to the property and personal rights of women, such as the varying dower systems as contrasted with the community property system in the west, make it evident that the burden of legislating to secure equality for women should not be put on Congress. Social, racial, economic conditions vary greatly in the different sections of this continent, so that where a national issue is not involved, it is surely wiser to allow local communities to adjust their own social institutions to their own ideas of their own needs."

F. W. G.

#### RUFUS CHOATE ON "CONSERVATION."

The attention both of men and women lawyers is called to some words of Rufus Choate. This passage is quoted with a full realization that the rising generation does not quite relish the style of oratory which was prevalent in Choate's day, but those who read it sympathetically with a desire to understand a serious message from the past expressed with all the professional enthusiasm and vivid personal force of a master of American advocacy will find that Rufus Choate said something worth remembering today. In the course of an address to lawyers and law students on July 3, 1845, he said:

"May it not one day be written, for the praise of the American Bar, that it helped to keep the true idea of the State alive and germinant in the American mind; that it helped to keep alive the sacred sentiments of obedience and reverence and justice, of the supremacy of the . . . reason of the law over the fitful will of the individual and the crowd; that it helped to withstand the pernicious sophism that the successive generations, as they come to life, are but as so many successive flights of summer flies, without relations to the past or duties to the future, and taught instead that all — all the dead, the living, the unborn — were one moral person, — one for action, one for suffering, one for responsibility, — that the engagements of one age may bind the conscience of another; the glory or the shame of a day may brighten or stain the current of a thousand years of continuous national being? Consider the profession of the law, then, as an element of

conservation in the American State. I think it is naturally such, so to speak; but I am sure it is our duty to make and to keep it such. . . . I speak in the general, of course, not pausing upon little or inevitable qualifications here and there, — not meaning anything so absurd as to say that this law, or that usage, or that judgment, or that custom or condition, might not be corrected or expunged, — not meaning still less to invade the domains of moral and philanthropic reform, true or false. I speak of our general political system; our organic forms; our written Constitutions; the great body and the general administration of our jurisprudence; the general way in which liberty is blended with order, and the principle of progression with the securities of permanence; the relation of the States and the functions of the Union, — and I say of it in a mass, that conservation is the chief end, the largest duty, and the truest glory of American statesmanship.”\* (Life & Writings, Vol. I., pp. 417-19.)

Any man or woman, who may read this passage and who is habitually annoyed by any mention of the word “conservatism” in any sense but who is enthusiastic over the idea of “conservation” as applied to natural resources or in other directions, will please notice that Mr. Choate used the word “conservation” as applied to the intellectual and moral resources of mankind, and that he was not talking of the “stand-pat” “conservatism” which forms so popular an epithet for political purposes from time to time.

F. W. G.

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\*In reading such passages, the following comments, written in 1882, on the orators of the early nineteenth century may entertain, as well as enlighten as to the causes of change in oratorical style:

“The future Websters and Choates will use fewer words, and they will say more. If those wonderful men were of our present time, they would still persuade us and overcome us, but it would be with less of a flourish. . . . The younger men [of to-day] have a range of knowledge and a kind of training which the oldest generation now at work has lived in ignorance of. In the days when the chief reading was English literature, the Latin and Greek classics, the Bible, the Constitution, and pamphlets on political parties of the United States, it was not only comparatively easy for an orator to know what his audience would respond to, but it was sure that if they listened at all they would at least admire a familiarity with those few fields of learning which were not only admitted, but claimed on all sides to be the Elysian fields of a happy intellectual life. Such reading, also, was directly stimulating to the ready and graceful utterance of a few ideas in the midst of abounding sentiment” (Am. Law Rev. February, 1882, p. 190.)

THE REASON FOR APPEARANCE OF THE "REARRANGEMENT" OF THE CONSTITUTION IN THE GENERAL LAWS AND AN EXPLANATION OF THE CAPTION UNDER WHICH IT IS PRINTED.

The General Laws which took effect January 1st, 1921 are now printed and ready for distribution. The reason for the delay, as is generally known, was the litigation before the Supreme Judicial Court over the question as to what document should be printed as the "state constitution."

The earlier story of the controversy in regard to this question has been told from time to time in this magazine (See Vol. IV, 116, Feb. 1919; Vol. IV, 309, August 1919; Vol. V, No. 2, Feb. 1920; H. 993 and S. 243 and discussion pp. 18-20 and pp. 86-91). After the Advisory Opinion of the Justices in February, 1920, rendered to the Governor and Council to the effect that the constitution of 1780 and its amendments was, and that the "Rearrangement" was not, the constitution, and after the legislature rejected the proposal to submit the "Rearrangement" to the people, as an "amendment," the competition between the two documents arose again in connection with the printing of the General Laws. At the special session of 1920 the legislature passed a resolve (Chapter 86) as follows:

"RESOLVE PROVIDING FOR THE PRINTING OF THE  
GENERAL LAWS.

"*Resolved*, that a joint special committee, to consist of one member of the Senate, to be appointed by the president, and two members of the House of Representatives, to be appointed by the speaker, be authorized to employ such assistants as it may deem necessary, who shall, under its direction, prepare for the printers the General Laws of the Commonwealth enacted at the present session of the general court, and likewise under its direction shall examine and correct such proof sheets thereof as it may be found necessary to print. The said committee is also authorized to provide for a suitable introduction to the General Laws, the preparation of

tables showing the disposition made of the Revised Laws and of the general statutes passed since the enactment of the Revised Laws, marginal notes indicating the statutory history of the various sections of the General Laws, together with citations of court decisions, the completion of the index of the General Laws, and the printing of the Federal and State constitutions in the first volume of the General Laws." (Approved December 14, 1920.)

The members of this committee were Hon. Augustus P. Loring of the Senate, and Hon. B. Loring Young and Essex S. Abbott, Esq., of the House. The story of the controversy is briefly told by this committee in the Preface to the General Laws as follows:

"Messrs. Abbott and Young, acting upon the advisory opinion of Justices of the Supreme Judicial Court, 233 Mass. 603, voted to print the Constitution of 1780, with its amendments, as the State Constitution. Mr. Loring, being of opinion that the Rearrangement of 1919 should be printed as the State Constitution, brought the matter before the Supreme Judicial Court on a writ of mandamus, which was argued by special assignment on April 25, 1921. A rescript of the court, dated August 8, 1921, decided that the Constitution of 1780, with its various amendments, and not the Rearrangement of 1919, is the State Constitution. The laws could not go to press until this question was decided. Since then the work has gone forward as fast as conditions would permit.

"The committee has decided to print the Rearrangement of the Constitution, as provided in Article 158 thereof and in accordance with the following dictum in the opinion of the Justices, 223 Mass. 603, 611:

'The rearrangement of the Constitution is an important instrument. It purports to present in unified form and in logical sequence the existing and operative provisions of the Constitution. It possesses all the sanctions naturally flowing from the circumstances attendant upon its origin, composition, adoption, approval and ratification. Doubtless its convenience and accessibility are its abundant justification.'

“In printing the State Constitution and the Rearrangement, the proofs have been compared with the original documents, and the original wording and punctuation have been followed.”

As the appearance of the rearrangement printed before the State Constitution in the first volume of the General Laws may surprise some and may perhaps be misunderstood by others, the attention of the bar is called to the caption under which the rearrangement appears and to the differing views, which still persisted after the decision of the court, on the question whether the document had to be printed as a convenient document, although it was finally decided not to be the Constitution. The caption under which the document is printed is as follows, the type being reproduced as nearly as practicable.

## THE REARRANGEMENT OF THE CONSTITUTION OF THE COMMONWEALTH.

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ADOPTED BY THE CONSTITUTIONAL CONVENTION OF 1917, AND RATIFIED BY THE PEOPLE NOVEMBER 4, 1919. THIS INSTRUMENT HAS BEEN CONSTRUED BY THE SUPREME JUDICIAL COURT NOT TO BE THE CONSTITUTION OF THE COMMONWEALTH. IT IS PRINTED HERE WITH MARGINAL REFERENCES TO CORRESPONDING ARTICLES OF THE CONSTITUTION OF THE COMMONWEALTH AND ITS AMENDMENTS, WHICH CONTROL IN CASE OF DIFFERENCE. SEE OPINION OF THE JUSTICES, 233 MASS. 603, AND LORING V. YOUNG, DECIDED AUGUST 8, 1921.

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The foregoing caption appears on page XXIII. Then follows a digest or table of contents covering about four pages. Then on page XXVII appears a second caption as follows : —

## A CONSTITUTION OR FORM OF GOVERNMENT FOR *The Commonwealth of Massachusetts.* [REARRANGEMENT.]

This second caption is followed by the text of the “Rearrangement.”

In the Manual of the General Court for 1920 and for 1921, the Constitution and its amendments are printed first with a table of contents and index, and the rearrangement is then printed under the caption,

**“THE REARRANGEMENT OF THE CONSTITUTION  
SUBMITTED BY THE CONSTITUTIONAL  
CONVENTION**

**and**

**Ratified by the People November 4, 1919.”**

Then follows a table of contents and then the heading,

**“A CONSTITUTION**

**or**

**FORM OF GOVERNMENT**

**for**

**THE COMMONWEALTH OF MASSACHUSETTS.**

**[Rearrangement.]”**

In the Acts and Resolves of 1920, the Constitution and Amendments are printed first with an index, then follows a blank page containing the following:

**“THE REARRANGEMENT OF THE CONSTITUTION  
SUBMITTED BY THE CONSTITUTIONAL  
CONVENTION AND RATIFIED  
BY THE PEOPLE**

**at the**

**STATE ELECTION, NOVEMBER 4, 1919”**

The next page is blank and then the rearrangement is printed under the following heading,

**A CONSTITUTION**

**or**

**FORM OF GOVERNMENT**

**for**

**THE COMMONWEALTH OF MASSACHUSETTS.**

**[Rearrangement.]**



The same is true of the Acts and Resolves of 1921 with the addition of a slip, pasted in at the beginning of the rearrangement, reading as follows:

“As to the effect of the ratification of the Rearrangement of the Constitution by the People, November 4, 1919, see Opinion of the Justices, 233 Mass. 603, and *Loring v. Young*, decided August 8, 1921.”

In the course of a discussion of the subject, it was suggested that the form of caption under which the rearrangement was printed in the Manual for the General Court and in the Blue Book above mentioned was seriously misleading in that such caption suggested that the rearrangement had some undefined legal character resulting from the ratification by the voters at the polls on November 4, 1919, and that it was unfortunate that any such suggestion should result from the manner of printing the document, as there was not sufficient basis for such a suggestion either in the Advisory Opinion of the Justices or in the opinion of the majority of the court, which judicially decided that the original Constitution and its amendments still form the Constitution of the State.

When the question arose of printing the rearrangement first in the General Laws before the Constitution and its Amendments, instead of after, as it had appeared in the Manual and in the Blue Books, this question assumed still greater practical importance, for there was much more likelihood of misunderstanding and confusion if the document appeared first without any adequate explanation of its nature. It was suggested that such a course would be contrary both to the spirit and the letter of Art. XI, Chap. 6, which requires that, “printed copies” of the Constitution

“shall be prefixed to the book containing the laws of this Commonwealth in all future editions of the said laws.”

The substance of the differing views expressed as to the printing of the document appears in the following extracts from certain correspondence on the subject. One view was,

“The duties of the committee are . . . ministerial. It has no authority to define or describe the rear-

rearrangement and the court cannot confer such authority. If the committee has such authority the jurisdiction of the court is confined to compelling it to exercise such authority in case of refusal or neglect to do so, or, possibly, to restraining it from describing the Rearrangement as something which it is not. It can not direct how the committee shall define or describe the Rearrangement, except in this negative fashion. The order in which the rearrangement shall be printed is . . . within the exclusive control of the committee. . . . "Though not the constitution, it must be regarded, it seems to me, as part of the fundamental law, in other words, as constitutional in its character. Even as an index or a Rearrangement pure and simple it must, it seems to me, be so regarded. As a part of the fundamental law, in other words, of the constitution, the committee must print it just as it is, caption and all. The committee has no more authority to omit or change the caption, than it has to omit or change any other part of the Rearrangement. It has no authority to edit the Rearrangement."

The opposite view, in answer to the foregoing suggestions, was expressed as follows, while the duties of the committee are clearly ministerial,

"I fail to see any basis of authority for the committee to print the rearrangement at all except by a wide stretching of the authority to index and supply explanatory material in a preface or marginal notes or footnotes."

One of the briefs filed with the Supreme Judicial Court in support of the continued existence of the original Constitution and its amendments contained the following statement:

"This brief maintains the proposition that it is clear beyond any reasonable doubt that the Constitution of 1780" etc., "still remains as the Constitution" and "that the rearrangement . . . has no Constitutional character or force whatever."

After referring to this passage, the writer continued,

"I believe that is clearly the judgment of the majority of the court as demonstrated by the opinion. I have not yet seen any attempt to answer the last paragraph of the attorney-general's brief that, as it is not the Constitution and is not a law, there is no authority to print under the resolve. There is no halfway place between the Constitution and a law from which it can get legal force of any kind."

Accordingly, "all the benefit in the way of convenience may be obtained by printing the document practically as a footnote with some . . . unmistakable caption . . . that the legislature could authorize that together with any other editing that might be considered advisable; that it is 'unthinkable' that the legislature could not authorize the editing of the document as the Constitution is amended from time to time or omit it, or that it should be necessary to amend both documents, which might be suggested as it was last year if the position above quoted is correct. I do not believe the opinion of the court leaves any such position open and, if the committee is to print the rearrangement on the expressed ground of its having some legal character, rather than a convenient explanatory footnote open to editing and to be kept up to date from time to time, I think the matter should go before the court again to avoid any such ambiguous situation.

I think if you will reconsider you will see that I must be right in denying the existence of any 'twilight zone' between or outside of a Constitution and a law from which this document can derive any legal character whatever."

In connection with the views above expressed, a petition for mandamus was prepared for the purpose of again bringing the matter before the court if it seemed necessary to avoid serious constitutional confusion. This petition was never filed because in the opinion of the person by whom it was drawn, the ultimate caption decided upon by the committee was probably sufficient to avoid serious confusion in view of the fact

that it not only specifically referred to the opinions of the court, but specifically called attention to the fact that there were differences between the language of the rearrangement and the original language of the Constitution and its amendments, and that the latter controlled in case of difference.

The writer of this note is aware that in the minds of a good many members of the bar, many of whom probably have not read and considered the rearrangement with any particular care, the controversy over the two documents seemed a nuisance, in that it delayed the publication of the General Laws, which was inconvenient. Fully appreciating this natural reaction of busy practitioners who, like most of us, do not read the Constitution until they have to, I call their attention to the discussion, in the various briefs, of substantial differences in language between the rearrangement and the Constitution and amendments. One of the points in the argument before the Supreme Judicial Court related to these differences, one argument in favor of the substitution of the rearrangement as the Constitution being that, because of these substantial changes, the rearrangement must be a new Constitution or nothing; and one argument against the rearrangement being that, as these substantial changes in language and meaning had not been reported to the convention or considered by that body or by the people as amendments and as the effect of some of the changes was obviously not noticed by some of the framers of the document, it was clear that the convention and the people never intended to wipe out their existing Constitution as a whole and substitute a new document containing these changes.

It is of special importance that the bar should understand at the outset the historical relation between the two documents, which they will find printed at the beginning of the General Laws, because, while it is true that much of the careful and public-spirited work which was put into the preparation of the rearrangement by the sub-committee of the convention doubtless will prove conveniently useful, yet, the printing of this document as a sort of a digest or headnote in the General Laws, in addition to the original Constitution, is an experiment which may, or may not, ultimately prove as useful as is expected. It is not generally known by the bar that this is not the first time that the Massachusetts Consti-

tution has been codified or "re-arranged". The experiment was tried to some extent in 1844 and the printing of the document was abandoned in 1855. The recorded story of this earlier experiment, which was called to the attention of the Supreme Judicial Court in one of the briefs, is reprinted here for the information of the bar.

#### THE STORY OF LUTHER CUSHING'S REARRANGEMENT OF 1844.

At the end of the preface to the report of the proceedings and debates of the convention of 1820, first published in 1853 from the original reports of the *Boston Advertiser*, there appears the following note:

"In 1844, Hon. Luther S. Cushing prepared a draft of the Constitution of Massachusetts by striking out the annulled or obsolete portions of the instrument and inserting the amendments in their proper places. This draft has been usually printed since that time as the Constitution. It fully answered the purpose for which it was designed, viz., 'for the convenient use of those who desire to ascertain what the existing provisions of the Constitution are, without the trouble and labor of tracing them historically from the original instrument through all the various amendments.' Its use, however, is likely to cause confusion, when a particular article or chapter is referred to, if the reader does not distinctly bear in mind its character."

"Luther Cushing was one of the enthusiastic supporters of the codification movement in the 30's. He was one of the editors of the *American Jurist*, in which a considerable amount of the literature of the codification movement appeared. He was a member of the special commission of 1836 appointed by Governor Everett to consider the question of codifying the common law (see *I Mass. Law Quarterly*, pages 323 to 328). It is not surprising, therefore, that his interest in the codification extended to the Constitution, although there were at that time only eleven amendments.

His attempt, however, was not as ambitious as the present rearrangement. The work was described in the 'Advertisement' which forms a preface to the supplements to the Revised Statutes which were published in consolidated form in 1844, again in 1849, and again in 1853, as follows:

'The Constitution has been revised by striking out the annulled or obsolete portions of that instrument, and by inserting the amendments in their appropriate places. This revision is intended for the convenient use of those who desire to ascertain what the existing provisions of the Constitution are, without the trouble and labor of tracing them historically from the original instrument through all the various amendments. Those who wish to investigate any constitutional provision, in the manner last mentioned, will find the original instrument, together with the first eleven amendments, prefixed to the Revised Statutes, and the twelfth and thirteenth amendments in the present volume. This revision, at the time of its first publication, was examined by John G. Palfrey, Esq., then Secretary of the Commonwealth, whose certificate to its correctness is appended to the instrument.'

The Constitution as thus arranged and printed had the following note printed in brackets at the beginning, directly under the caption :

'All those parts of the Constitution which have been annulled, or become obsolete, are left out, and all the new provisions contained in the amendments are inserted in the places where they belong,'

with the following certificate at the end :

'I hereby certify, that I have examined the foregoing revision of the Constitution, and find that the same embodies the original instrument and all the amendments.

JOHN G. PALFREY, *Secretary.*'

Beginning with 1847, and continuing each year to and including 1855, the Rules and Orders of the House of Representatives contained this consolidated document, with the following note :

'The Constitution of Massachusetts, as here published, is the revision of that instrument, prepared by Hon. L. S. Cushing, one of the Justices of the Court of Common Pleas, for the supplements to the Revised Statutes, published by the State printers, Messrs. Dutton & Wentworth, by whose permission it is now printed, for the use

of the legislature, only in connection with the Rules and Orders of the House of Representatives. . . .”

Apparently in 1855 and thereafter the legislature came to the conclusion that it was more convenient on the whole and less confusing to have the original document alone with its amendments following in their chronological order. At all events, Mr. Cushing's document passed out of use, and was not continued as other amendments were added.

The only printed suggestion as to the reason for the discontinuance appears in the note to the preface of the report of the proceedings of the convention of 1820 already quoted. That note was prepared by Nathan Hale and Charles Hale, the editors of the debates. One of them, Nathan Hale, was the editor of the *Advertiser*, from which the reports of the debates were taken, and the other, Charles Hale, was the Speaker of the House of Representatives, so their comments in the note referred to may be assumed to reflect some of the practical experience of lawyers and legislators at the time.

Returning to the “Rearrangement” of 1919—as stated in the passage from the preface to the General Laws already quoted, the committee decided to print the rearrangement,

“As provided in Art. 158 thereof and in accordance with the . . . ‘dictum’ in the opinion of the Justices in which the Justices referred to the rearrangement as an ‘important instrument’ purporting to present the existing and operating provisions of the Constitution and possessing all the sanctions naturally flowing from the circumstances attendant upon its origin, composition, adoption, approval and ratification,”

and the further suggestion of the justices that,

“Doubtless its convenience and accessibility are its abundant justification.”

These remarks of the Justices obviously cannot be interpreted as attributing any legal force or character to the document. Such an interpretation would be “unthinkable,” as pointed out earlier in this discussion. There is no magic in the word “instrument” or the other words used. The

words were used obviously as a natural expression of appreciation by the Justices of the work which had gone into the preparation of the document. They were used in the advisory opinion and were not used in the majority opinion of the court which finally determined the legal position and force of one document, and necessarily excluded the other from any share in that position and that force.

The exact character of the rearrangement, as it is printed, is that of an extended headnote subject to modification and alteration to fit the facts as they exist from time to time as future amendments are made to the operative and legally binding Constitution of 1780 and its amendments. Such changes as may be necessary to keep the headnote up to date obviously can be made without special legislative action whenever a new edition of the General Laws is issued under the authority of the legislature. Such a headnote is no more a part of the Constitution and the laws than the explanatory footnote which has usually appeared at the end of the Constitution giving a brief history of the Constitutional conventions and the various specific amendments.

Presumably the court, in citing constitutional provisions in its opinions, will continue the practice of citing the articles of the original document and its amendments and not citing the rearrangement. It is submitted that such a practice eventually will keep the constitutional law of the state clearer than if the practice of double citations should be adopted by the court. However much counsel may make use of the rearrangement in their briefs, it is particularly important that the court by its practice, in view of the fact that two documents are printed, should constantly remind the bar that only one of them has any legal force. It is to be regretted that the vague notion that there was some nebulous legal character attached to the rearrangement as illustrated above, which discouraged the editing of the document, was strong enough to prevent the elimination of the second caption after the table of contents and before the Preamble reading as follows,

“A Constitution or Form of Government for the Commonwealth of Massachusetts [Rearrangement.]”

Experience only will show to what extent this caption will cause confusion. As already pointed out, it was left in there



in deference to the view that it was in the document submitted by the constitutional convention and "ratified" by the people, and was in the pamphlet, copies of which were sent to the voters by the Secretary of the Commonwealth. But this view, of course, begs the whole question which has been decided by the court.

F. W. G.

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NOTE ON THE LEGAL EFFECT OF THE POPULAR VOTE ON  
THE REARRANGEMENT.

This question so far as it relates to printing is not of immediate practical importance because the rearrangement is printed, as already explained, in the General Laws under an explanatory caption and we shall find out whether it proves in practice to be as convenient as is expected. If it should prove in practice to be more confusing than convenient, as may have been the case with the rearrangement used between 1844 and 1855, this question of printing and in any case the question of editing may again assume practical importance. It is for this reason that it seems advisable to discuss the subject briefly at this time.

The rearrangement gained no legal force whatever from the fact of the vote at the polls. That vote stands on about the same footing as a vote upon a question placed upon the ballot in a legislative district under the so-called "public policy" or "public opinion act." It has no legally binding effect. The independent judgement of the representatives of the whole people cannot be thus coerced into printing a document which is neither a law nor a constitution.

The only standards which can be officially or judicially recognized in this matter in a representative government of free men, was set by Edmund Burke in November, 1774, in his speech to the electors of Bristol in words which will be remembered by somebody as long as free government exists. In view of the current confusion of thought about such matters and the tendency in political discussion to discard entirely the individual judgment of representatives as of little value compared to the collective judgment of the voters at the polls, Burke's words are reprinted for the purpose of placing this whole matter in better perspective:

“Certainly, gentlemen, it ought to be the happiness and glory of a representative to live in the strictest union, the closest correspondence, and the most unreserved communication with his constituents. Their wishes ought to have great weight with him; their opinions high respect, their business unremitting attention. It is his duty to sacrifice his repose, his pleasure, his satisfactions, to theirs; and above all, ever, and in all cases, to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you, to any man, or to any set of men living. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. My worthy colleague says, his will ought to be subservient to yours. If that be all, the thing is innocent. If government were a matter of will upon any side, yours, without question, ought to be superior. But government and legislation are matters of reason and judgment, and not of inclination; and what sort of reason is that in which the determination precedes the discussion, in which one set of men deliberate and another decide, and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments? . . . *Authoritative* instructions, *mandates* issued, which the member is bound blindly and implicitly to obey, to vote and to argue for, though contrary to the clearest convictions of his judgment and conscience — these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenour of our Constitution.”

This same high standard of independent and individual responsibility of representatives was reflected in the last paragraph of the Pittsfield instructions to Col. William Williams, the Pittsfield delegate to the convention of 1780, in which he was directed—

“To act agreeable to the dictates of your own judgment after you have heard all the reasoning upon the various subjects of disquisition having an invariable re-

spect to the true liberty and real happiness of this state throughout all generations, any instructions herein contained to the contrary notwithstanding" (See III Mass. Law Quarterly, page 341).

These passages set the standard of interpretation as to the nature of "instructions" to free representatives of free men which can be given under article XIX of the Bill of Rights. These quotations seem to contain the convincing answer to the somewhat vague view of those who think that the vote of the people ratifying the "rearrangement" of the constitution submitted by the constitutional convention amounted to a mandatory direction to the legislature to print that document in addition to the constitution although it has been judicially decided not to be the constitution itself and, not only to print it, but to print it without editing from time to time to correct obvious mistakes or to adjust it to future changes in the real constitution.

Such a vote as that of November 4, 1919, if it has any force at all under the circumstances, can certainly be nothing more than a general suggestion to the legislature from a considerable body of voters, and the force of that suggestion must depend upon the nature of the question and the amount of information which the voters may be supposed to have in regard to it. It does not relieve a representative from the responsibility of making up his own mind.

This vote in regard to the so-called rearrangement may indicate that a good many voters, although less than one-half of those who went to the polls on that day, thought that some rearrangement might be a good idea. They did not have before them the original constitution and its amendments so that they could compare the two documents carefully and find out what, if any, changes had been made in this new document. Although they had the text of the rearrangement before them, it was before them almost accidentally, and not as a result of any official action.\* Accordingly, there is no presumption that they read it, or of any kind whatever as to their knowledge of the contents of the rearrangement.

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\*[The pamphlet containing it was not authorized or directed by the Convention; see Journal pp. 861 and 866. Compare Debates, Vol. IV, pp. 73-74 and 85-86, and brief for Respondent Young, pp. 13-14 and 40-41.]

Under certain circumstances, and for certain purposes, citizens and voters are charged with putative knowledge of all law, but there are no circumstances here which call for the straining of fiction against facts of common knowledge. There is no presumption that a single voter after he received the pamphlet from the secretary of the Commonwealth took the trouble to get a copy of the original constitution and its amendments and compare them with the so-called rearrangement. Accordingly, the vote of a minority of the 532,483 persons who went to the polls on November 4, 1919, without any comparative study of the two documents, does not carry conviction on the question of the wisdom and expediency of printing the so-called rearrangement in addition to the constitution perpetually and without editing. If the legislature finds the document sufficiently convenient, it can continue to order it printed in future with proper caption, editing and explanatory notes, but it is not bound to do so.

The views here expressed differ on this point of printing from the views expressed by the writer on pages 321 and 322 of the "Massachusetts Law Quarterly" for August, 1919, as well as in a letter to the *Springfield Republican* of November 3, 1919. The change of view is the result of more careful study and reflection, and the reasons for the change are stated above for the consideration of the bar.

F. W. G.

# ANNUAL REPORT OF THE COMMITTEE ON LAW AND PROCEDURE OF THE ASSOCIATION OF JUSTICES OF THE DISTRICT COURTS OF MASSACHUSETTS.

*(Reprinted by permission.)*

## *To the Members of the Justices Association:*

The Committee on Law and Procedure begs leave to submit its annual report.

In January of this year Hon. Henry T. Lummus, the able and efficient Chairman of this Committee, was appointed to the bench of the Superior Court, and, while we are glad and proud of his promotion, we feel that the Association and this Committee have lost his very valuable services.

The President and Executive Committee of the Association appointed Hon. Oscar A. Marden, Justice of the District Court of Southern Norfolk, to fill the vacancy, and Hon. Frank A. Milliken, Justice of the Third District Court of Bristol, as chairman.

The report of the Judicature Commission contained various matters involving courts of first instance, and early in the year a joint meeting of the Executive Committee and the Committee on Law and Procedure was held, the various recommendations were discussed and it was decided that the Executive Committee should look after and attend to the various recommendations for legislation.

Chapters 338, 413, 417 and 430 are the only specific acts of legislation affecting District Courts of the Acts of 1921.

Chapter 338 provides that if a Saturday, which is the entry day in District Courts, is a holiday, the entries are to be made on the next business day following.

Chapter 413 relates to pensions of Justices of the District Courts.

Chapter 417 relates to trustee process in District Courts and provides that whenever an action is commenced by trustee process in a district court in the district in which the party named in the writ as trustee lives or has his place of business, which could not be brought in that district except

because of such evidence or business, the court may on motion of any party thereto transfer the case to any district court in which the action might have commenced had there been no trustee named in the writ.

Chapter 430 *changes the names* of all police and municipal courts (except Boston) to District Courts.

This Association has heretofore gone on record in favor of the appointment of an Administrative Committee and appellate system to prevent double trials on facts. These two recommendations are combined in No. 5, page 136, of the Judiciary Commission and report.

Your committee is of the opinion that they should be separated, and the Executive Committee take the necessary action to secure this legislation.

As to the other recommendations of the Judiciary Committee, your committee is favorable to the removing the jurisdictional limits in civil actions; the avoidance of conflicts of jurisdiction over certain problems of Domestic Relations; the simplification and less expensive procedure relative to Equitable Process after judgment.

As to Special Justices, your committee does not feel that the proposed legislation meets the situation. The criticism is rather directed at the individual who holds the office.

Your committee deprecates the use of the title of Special Justice or Judge by any individual in the matter of private practice.

It is not a salutary thing to have it constantly appear as it does in the press that some notorious criminal cases are being defended by Judge ———. It tends to create misunderstanding in the eyes of the public and makes a bad impression and reflects upon every district court in the Commonwealth. A keen sense of the professional proprieties ought to suggest to the person himself this bad taste. Perhaps the newspapers are very much to blame. The proposed legislation of forbidding the Special Justice practicing in the court of which he is a member will not remedy the evil.

May 5, 1921, this committee sent out a circular to all the justices inviting them to send to it any questions that were troubling them, — this was called the "Question Box." Very few have availed themselves of this opportunity. The first question propounded was: "What is the practice under the

Small Claims Act as to requiring the defendant to sign his answer on the docket card, or, if he sends it by mail, should the clerk enter the copy of the signature on the card?" To which the answer was made: Defendant's signature not required by the Act or the rules. All that is entered on the docket is a summary of the nature of the defense as stated to the clerk. If the answer comes in writing, the clerk preserves it.

2d. Can an attorney who does a considerable collection business in his office give his father a general power of attorney *in re* small claims?

*Answer* — No. The general rule is that an agent in whom is reposed trust and confidence or who is required to exercise discretion can not delegate his authority. See Rule 12.

Do not allow the small claims cases to degenerate your court into a mere collection agency, as this would be "contrary to the spirit of the statute and subversive of the procedure."

3d. Will the Dubuque process lie if the debtor has failed to pay? *Answer* — The judgment in small claims cases is still a judgment. If the foundation of that judgment falls within the equitable process law, that remedy after judgment may still be followed. There is nothing in the small claims law indicative of an intent to restrict previously existing remedies upon judgment.

The objects of the Small Claims Act in cases involving up to \$35.00 are to avoid the delays incident to formal court procedure, the expenses of service, the expense of an attorney and to aid the poor creditor. To accomplish this, your committee suggests that the justice investigate the case in as informal a manner as possible; he, rather than counsel or parties, is in active charge of the case; do not allow cross examination, nor postpone hearings on account of engagement of counsel; after the court has ascertained the facts, if a party or counsel desires to make any *suggestion* as to fact or law that can be of assistance, of course you will hear them, but in as pleasant and tactful a manner as possible avoid the appearances of the trail of a lawsuit.

4th. Is there any right of appeal in proceedings against

neglected children under General Laws, Chapter 119, except from the adjudication provided in Section 47? In case of delinquent children except from adjudication as provided in Chapter 119, Section 56? A similar question as to illegitimate children under Chapter 273, Section 12.

*Answer* — The appeal in these cases is from the adjudication as set forth in the above sections of the statutes, no appeal lies from any order or other disposition of the cases. See Report No. 7, page 39 *et seq.*, August, 1916, Committee on Law and Procedure.

5th. What do you think of the advisability, in automobile cases, of fine and costs? I ask this for this reason — the towns which do not have a paid police force are put to quite an expense these days in automobile cases, and the fines go to the Commonwealth.

*Answer* — Prior to 1890 it was the ordinary practice to impose a fine and costs, but by St. 1890, C. 440, Section 3, no costs by that name could be taxed against a defendant in any criminal proceeding and the practice was thereafter discontinued; by this statute, however, the court before imposing a fine was to determine what were the reasonable and actual expenses of the prosecution and impose a fine to include the whole or any part of the expenses so found. This is now found in General Laws, Chapter 280, Section 6. As a court, therefore, it is none of your business to look after or worry about municipal finances; it may, however, be a proper subject for legislative inquiry.

6th. We now hold an inquest in all cases where there is a motor vehicle involved in the accident, and the State has to be notified so as to send a representative if it so desires. Suppose, as in a recent case, a man from Rhode Island was the cause of the death of a child in this district, and the officer immediately prefers a manslaughter charge against him. It becomes necessary to hold an inquest in this case. One of the Special Justices hears the case; he makes a finding that the driver was not responsible for the accident or that no unlawful act of the driver contributed to the injury. A manslaughter warrant is outstanding and has been served on the defendant and bail given. Do you know, under such a set



of circumstances, what is being done as to a hearing in the District Court on the manslaughter warrant? It would seem a little strange for one judge, in the same court, to find no criminal responsibility, and then for another judge to hear the manslaughter charge and hold him for the grand jury. On the other hand, suppose the judge at the inquest did not hear all the evidence that is presented at the hearing on the warrant.

*Answer* — The short answer as to inquests and complaints for manslaughter in cases of death in motor vehicle cases is that they are separate and independent proceedings. As to inquests, see *Commonwealth v. Ryan*, 134 Mass. 223; *Jewett v. Boston Elevated*, 219 Mass. 528; *Carney v. Boston Elevated*, 219 Mass. 552.

The above are all the questions received in response to the "Question Box" circular.

It has come to the attention of the committee that in different parts of the State sentences have been imposed for the "illegal transportation of intoxicating liquor." Your committee is of the opinion that there is now no such offense under our statutes. The provision of Revised Laws, Chapter 100, relating to such transportation has been omitted from General Laws, Chapter 138, as finally passed.

Some of the judges are having trouble with the proffer of evidence obtained in apparent violation of constitutional requirements, and the question arises (1) whether the court will inquire at all when the evidence is offered, and (2) how far shall the court go in the determination of a reasonable or unreasonable search or seizure.

Amendments Article IV and Article V of the Constitution of the United States provide against unreasonable searches and seizures, and compelling a person in any criminal case to be a witness against himself.

As to these amendments, it should be observed that they are held to operate solely on the Federal government, its courts and federal officers, and not as a limitation upon the powers of the States, the state legislature, officers and courts being limited in this respect by the provisions of the State constitution — *Commonwealth v. Farmer*, 218 Mass. 507; *State v.*

*Peterson*, (Wyoming) 194 Pac. Rep. 342 S. C. 13 A. L. R. 1284, 35 Cyc. 1269.

Massachusetts Declaration of Rights, Articles XII and XIV, however, contain substantially similar provisions, and so do the other States.

In *Commonwealth v. Tibbetts*, 157 Mass. 519, an officer under authority of a search warrant for intoxicating liquor of a man's house found certain instruments adapted to procure abortions, and two criminatory letters were found. The wife of the man was indicted and it was objected that the criminatory articles and letters found by the officer in the defendant's possession were not admissible in evidence because the officer had no warrant to search for them, his only authority being under the warrant to search her husband's premises for intoxicating liquor. The court over-ruled the objection holding that "evidence which is pertinent to the issue is admissible although it may have been procured in an irregular or even an illegal manner. A trespasser may testify to pertinent facts observed by him or may put in evidence pertinent articles or papers found by him while trespassing. For the trespass he may be held responsible civilly or perhaps criminally, but his testimony is not thereby rendered incompetent."

*Commonwealth v. Tibbetts* was cited with approval in *Adams v. New York*, 192 U. S. 585, affirming the same case in 176 N. Y. 351, Judge Day saying "the weight of authority as well as reason limits the inquiry as to the competency of the proffered testimony, and the courts do not stop to inquire as to the means by which the evidence was obtained."

It is stated in numerous cases outside of Massachusetts, that if timely application is made for the return of property seized in violation of the constitutional provision against unreasonable search and seizures before the trial or the offer of the property as evidence, it is the duty of the court to order the return of the property.

"The principle underlying the decisions admitting the evidence is that an objection to an offer of proof made in the trial of a cause raises no other question than that of competency, relevancy and materiality of the evidence offered and that consequently the court on such an objection can not enter on the trial of a collateral issue as to the source from which

the evidence was obtained. But since there is a right there must of necessity be a remedy, and the remedy is to be found in the making of a timely application to the court for an order directing the return to the applicant of the papers and property unlawfully seized. On such an application the question of the illegality of the seizure may be fully heard, and if the court erroneously refuses to return the papers and property, and thereafter receives them in evidence against the applicant and over his objection it is an error for which a judgment of conviction must be reversed." 10 R. C. L. 933.

This is expressly repudiated in *Youman v. Kentucky*, 189 Ky. 152 (1920) S. C. 13 A. L. R. 1303, and would seem to be in *Gouled v. United States*, decided February 28, 1921, by the United States Supreme Court, where it was held that an objection to the introduction in evidence in a criminal case of a paper *having evidential value only*, surreptitiously taken from the office of the accused by a representative of the Federal government is in time, though not made before trial, where such objection was made promptly upon the first notice the accused had that the government was in possession of the paper. The admission in evidence against the accused in a criminal case of evidence obtained by an illegal search of his premises and seizure of his private papers contravenes the guaranty of the United States Constitution, 5th amendment. This decision cites the cases theretofore decided by the United States Supreme Court bearing on the question.

In *Amos v. United States*, decided the same day, that the constitutional rights of a defendant were not waived when his wife admitted to his home government officers who came without warrant demanding admission to make search of it. (Judges can reconcile that decision with our case of *Commonwealth v. Tucker*, 189 Mass. 457, as best they may.)

In *Burdeau v. McDowell*, decided by the United States Supreme Court, June 1, 1921, it was held that the security afforded by the United States Constitution, 4th amendment, against unreasonable search and seizure applies solely to governmental action. It is not invaded by the unlawful acts of individuals in which the government has no part.

Brandeis, J., dissenting (Holmes, J., concurring) "Plaintiff's private papers were stolen. The thief, to further his own ends, delivered them to the law officer of the United

States. He, knowing them to have been stolen, retains them for use against the plaintiff. Should the court permit him to do so? That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the constitution requires their surrender, and that the papers could have been subpœnaed. This may be true. Still I can not believe that action of a public official is necessarily lawful because it does not violate constitutional prohibition, and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law, and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

In the light of these later decisions it is not improbable but that *Commonwealth v. Tibbetts* may be differentiated and modified, if not over-ruled, but until this is done we of the lower courts should follow the rule laid down by our own Supreme Judicial Court, so far as concerns the admission of the evidence at the trial. The question of entertaining the preliminary motion for return is a separate one, and we know of no precedents in this State for our guidance. There are some practical objections to the exercise of such a power by a court of first instance. One of them touches the power of the court to make good its order in case of defiance by police authorities. It is to be noticed that in *Wise v. Mills*, 220 U. S. 549, the district attorney refused to obey the order of the court for a return and was adjudged in contempt. Our Statute of 1916, now General Laws, Chapter 218, Section 4, giving district courts certain attributes of courts of general jurisdiction, may come into play here. But if an order of return be made and obeyed, and the defendant, convicted on remaining evidence, appeals, the district attorney would appear to be stripped of the opportunity to regain the evidence

returned, or to show that the order of return was erroneous. All this simply adds another count to the indictment against the double trial, and illustrates anew the public injustice of a system by which error of law advantages only the accused, but on the whole and for the present we recommend that the district courts accept the practice adopted, though with the greatest reluctance, by the municipal court of the city of Boston to refuse to entertain preliminary motions for return.

Another question has been submitted: Whether in a complaint against a person for the violation of General Laws, Chapter 138, the certificate given under Section 54, as amended by St. 1921, Chapter 495, by the analyst of the Department of Public Health of the percentage of alcohol in the sample submitted is admissible in evidence at the trial of the complaint.

The last sentence in Section 54 as amended is "such statement shall be *prima facie* evidence of the composition and quality of the liquors to which it relates, and the court may take judicial notice of the signature of the analyst or the assistant analyst and of the fact that he is such."

In the trial of a person accused of any offense, Article XII, Declaration of Rights, provides that "every subject shall have the right to meet the witnesses against him face to face," therefore upon objection made that the certificate would not be admissible, there is such doubt, the analyst should be in court and testify as a witness. In Section 56 it is provided that the certificate of the Department of Public Health shall be admitted as evidence on trials for the forfeiture of intoxicating liquor.

By St. 1921, Chapter 415, the report of the department of mental diseases is made admissible as evidence of the mental condition of the accused.

The legislative tendency illustrated by these statutes invites consideration of the rule of courtesy that none but courts of last resort should hold that the legislature has overstepped constitutional grounds.

District judges, as well as those of the Supreme Court, are sworn to uphold the constitution.

In an opinion, dated September 27, 1921, the Attorney General did not hesitate in holding that General Laws, Chapter 130, Section 6, was in violation of Massachusetts Declaration of Rights, Article XIV.

Another thing has been suggested that the Judges, at least of the larger courts, should follow the example of the Justices of the municipal court of Boston and wear robes. Mr. Chief Justice Taft is reported to have said, "Judges ought to wear robes. The robe would have a good effect on the judge himself, as well as on the people."

Respectfully submitted,

FRANK A. MILLIKEN,  
CHARLES L. HIBBARD,  
WILFRED BOLSTER,  
FREDERICK P. CABOT,  
OSCAR A. MARDEN.

November 5, 1921.

## THE WASHINGTON CONFERENCE ON LEGAL EDUCATION.

The resolutions of the American Bar Association at its meeting last summer in Cincinnati, relative to legal education, were reprinted for the information of the Massachusetts bar in the report of the Committee on Legal Education in the January number of the Quarterly on pages 18-20. No action was taken by the Massachusetts Bar Association on these recommendations at the annual meeting. Subsequently, notice of the conference of delegates of state and local bar associations to be held in Washington on February 23 and 24 to consider these recommendations and discuss the subject of legal education was received, and the Massachusetts Bar Association was asked to send delegates. The matter was taken up at a meeting of the Executive Committee on January 25, and the following vote was passed:

“The Executive Committee of the Massachusetts Bar Association has received and considered the notice of the Conference of State and Local Bar Associations on Legal Education to be held at Washington, D. C., on February 23 and 24, called in accordance with the vote of the American Bar Association ‘for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles set forth’ in the resolutions adopted at Cincinnati, Ohio, in 1921, by the American Bar Association.

The Executive Committee appreciates and shares the hope of a gradual improvement in the educational standards for admission to the bar reflected in said resolutions. As to the method specified in the resolutions of realizing that hope, the Executive Committee takes no action at the present time but authorizes the president to appoint three delegates, of which he shall be one, and in his discretion one or more alternates to represent this association at the conference, such delegates to be appointed as representative members of this association to vote in said conference in accordance with their individual judgment,

but without authority to commit this association to any policy or course of action."

In accordance with the foregoing vote, the president, Addison L. Green, Esq., Hon. Samuel L. Powers, and Reginald H. Smith, Esq., were appointed delegates.

The fact that such a conference is held in the national capital with the chief justice of the Supreme Court of the United States and leading members of the bar throughout the country taking part, reflects the growth of the public conviction that this subject demands attention.

#### PRELIMINARY REPORT ON THE CONFERENCE.

Since the conference above mentioned took place in Washington, the secretary has been informed that it was one of the most remarkable gatherings of lawyers which has been held in the country for years. The meeting place was Continental Hall, where the Disarmament Conference had just finished its work. The opening session was presided over by Hon. Clarence N. Goodwin, chairman of the conference. The other sessions were presided over by Chief Justice Taft of the Supreme Court of the United States, by Hon. William G. McAdoo, formerly Secretary of the Treasury, and by Hon. John W. Davis, formerly ambassador to Great Britain (who was introduced as the man who had won more cases before the Supreme Court of the United States than any other member of the bar). The opening and closing addresses were delivered by Hon. Elihu Root and these have been characterized as unequaled by any other addresses which he has delivered in his entire career. By a large majority the standards recommended by the American Bar Association were endorsed with some slight modification as to an "equivalent" in certain cases.

The great practical result of immediate importance is that the section of legal education of the American Bar Association has been made over from a debating society, which has been its main function for the past 25 years, into an executive body to classify law schools according to the standards now adopted and to publish the names of the schools which conform to those standards and those which do not, for the information of students intending to practice law. The section is to have



an advisory committee of one representative from each state to assist in spreading information as to the standards adopted and the importance to the public of their relation to the legal profession and its future ability to meet the growing demands upon it in rendering the public service which the community expects of the bar.

The resolutions of this conference and of the American Bar Association, of course, do not bind the action of any state or local association. They are persuasive in their character as such expressions of judgment necessarily are. It is of peculiar importance, however, that members of the Massachusetts bar should be kept fully informed of the movement which is going on in other parts of the country. One effect of low educational requirements is apt to be overlooked—when a state sets a low standard of requirements, as in Massachusetts, men who wish to become lawyers are encouraged to think that if they meet that low requirement they will have done all that is necessary to equip them for the bar. They are then left for the rest of their lives with the handicap of inadequate training, instead of being encouraged, by a high standard in the first place, to train themselves to be better lawyers. In other words, our present standard in Massachusetts tends to encourage young men to become poor lawyers by making it too easy for them to become members of the bar, when the same men might be made stronger, more capable, happier, and more useful to themselves and to the community if their ambitions were aroused to train themselves more thoroughly at the beginning. Education, of course, cannot take the place of character, but the whole American policy of education is based on the idea that it can help to bring out and to develop character. The sentimental “sob” argument about the poor boy which results in doing nothing to improve the standards of education for lawyers is not only bad for the community, but it is quite as bad for the poor boy himself who has the capacity to make good if he is encouraged to do so by requirements of the state which are reasonably adapted to the nature of the profession which he wishes to enter.

The prominence of lawyers in a democracy like ours is the result of an absolutely impersonal force which cannot be avoided. That force is the training needed to study and understand and apply principles of law. The more the com-

munity realizes the essential importance and the useful opportunities of this force of training in the study of principles and the necessity of a reasonable amount of general education to prepare a man for such study, the more public service and value will the state and nation get from the bar.

The Judicature Commission of Massachusetts in its report said,

“Massachusetts cannot afford to lag behind other states in the requirements of intellectual training for the bar. . . . We cannot expect any progress in the administration of justice without the aid of a trained and an educated bar. A stream cannot rise higher than its source and, in the long run, the standards of the courts cannot be above those of the bar.”

#### THE PRACTICAL QUESTION IN MASSACHUSETTS.

The main controversy in regard to the standards which have been recommended by the American Bar Association has centered about the following recommendation,

“ . . . The American Bar Association is of opinion that every candidate for admission to the bar shall give evidence of graduation from a law school complying with the following standards, (a) It shall require as a condition of admission at least two years of study in a college. . . . ”

Probably many members of the bar will be surprised at this recommendation and inclined to consider it a mistake, as the writer of this note considered it when it was proposed and first adopted by the American Bar Association at Cincinnati. While, considered as a recommendation by way of advice to men who wish to become lawyers, it was unobjectionable, it seemed to go beyond the point to which the support of public opinion might be expected as a required state standard. The fact that the recent conference at Washington, a different body composed to a considerable extent of different men from all parts of the country, has again endorsed this standard, however, adds great force to the recommendation. It is only fair for those of us who have been sceptical to keep our opinions in abeyance until we have learned more of the

discussion and the reasons for this action. Our opinions of Mr. Root and others are immaterial. We ought to be able to think about what men say without regard to our opinions of the men.

It must be remembered that many lawyers in Massachusetts whose opinion and practical experience are entitled to respect and who did not themselves have the benefit of a college education consider training in general education of more importance than the law school training.

It must also be remembered, as Emerson said, that "You must have a source higher than your tap," and that the setting of a general standard throughout the country may accomplish valuable public results even if that standard is not attained in practice everywhere. But we need not disturb ourselves, at present, in Massachusetts over the question whether such a standard is, or is not, too high, for we are so far below it today that the question is a purely academic one for us. Our present standard of general education for lawyers set by chap. 249 of 1915, now G. L. chap. 221, sec. 36, is, "Two years in an . . . evening high school or a school of equal grade." A day high school in Massachusetts means five days a week for forty weeks, besides home study, for four to five years, after an elementary school course. The use of the word high school as applied to evening schools is misleading. There is no standard requirement throughout the state so that the words quoted above from the statute have very little meaning. In 1915, the so-called evening high schools in Boston provided each year "twenty-four weeks, three nights per week, two hours per night" usually for four years. When this is compared with the requirements of a day high school, the difference is obvious. The evening high schools in other cities of the state vary greatly and many of them seem to require less than those in Boston as shown by information gathered in 1915.

The practical question for us in Massachusetts, therefore, is not whether we shall require two years in a college, but whether we shall require something more than two years in an "evening high school or a school of equal grade," whatever that means.

The Abraham Lincoln argument, which always appears sooner or later in these discussions and has already appeared

in the newspapers since the conference was held, cannot be used in support of the policy of doing nothing in Massachusetts. It is not fair to Lincoln. If men who wish to become lawyers would educate themselves by mastering the Bible and Shakespeare to the extent that Lincoln is reputed to have mastered them in order to educate himself, they would become sufficiently interested in their own education so that they would not object to reasonable requirements with all the modern opportunities of schools, libraries, etc., open to them. The fact is that in spite of these opportunities men do not educate themselves today as well as Lincoln educated himself with the few books that he was able to lay his hands on. The reason is that they are not required to meet a higher standard and naturally large numbers of them do not do more than they are required to do.

It is not the writer's intention in this note to suggest any specific act of legislation for Massachusetts, but merely to call attention again to the fact, pointed out in the report of the Judicature Commission on pages 128-129, that Massachusetts was advertised throughout the country, after the act of 1915, as having set one of the lowest standards of general education in America. Any step, therefore, however slight, which raises that standard, will help the commonwealth and its reputation before the country.

As soon as possible a fuller account of the conference and the discussions will be printed in this magazine.

F. W. G.

## SUGGESTIONS AS TO THE SHEPPARD-TOWNER ACT.

The recognition in the federal constitution of the principle of local self-government was based upon a philosophy which seems to be pretty generally forgotten today, but which is, nevertheless, as relatively sound as it ever was, and that is the philosophy of minding one's own business. This philosophy was obviously the basis of the tenth amendment which reserved to the states the powers not delegated to the United States.

The tenth amendment was the first of the proposed amendments submitted by John Hancock and approved by the Massachusetts Convention of 1788 as suggestions to the first congress, and the adoption of these as suggestions by that convention was an essential condition of the ratification of the federal constitution. The purpose of this amendment was not mere vague theory about "self-determination." It was a practical part of the system of government intended to be set up. Its origin in Massachusetts is described in the "Massachusetts Law Quarterly" for February, 1920, at page 125.

While in Marshall's day the question was whether the federal government would come into practical existence in the face of state opposition, now the question has arisen the other end up—whether the federal government may be made to gradually absorb the states by absorbing their powers, and whether this result is contemplated under the constitution by the people of the United States. Judge Miller, in 1887, said:

"The necessity of the great powers conceded by the Constitution originally to the Federal Government and the *equal necessity* of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex government." (See Miller "Lectures on the Constitution of the United States," p. 412).

Again, in another address, he said:

"While the pendulum of public opinion has swung with much force away from the extreme point of States'

Right doctrine, there may be danger in its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century, as it has been for the one whose close we are now celebrating." (See lectures, p. 24).

Before we go much further in the process of weakening the structure of the nation and the sense of individual responsibility of the citizens of the states and their representatives which that structure was intended to encourage, we may well turn, like Abraham Lincoln, to Shakespeare for a little wisdom, and we find the following lines:

"For it so falls out,  
That what we have we prize not to the worth,  
Whiles we enjoy it, but being lacked and lost,  
Why, then we rack the value; then we find  
The virtue, that possession would not show us  
Whiles it was ours."

—Much Ado About Nothing, Act IV, Sc. 1.

It is to be hoped, not only that the legislature of Massachusetts will decline to become a party to the Sheppard-Towner act, but that appropriate proceedings by taxpayers' bill or otherwise, will be taken to bring the question of the validity of this act of congress and the use of national taxes under it before the Supreme Court of the United States at the earliest opportunity. Some of the arguments in support of the act are discussed in the reprint from the "Constitutional Review" in this number.

Since it is proposed that congress and more federal bureaus shall poke their noses into more things with the federal taxing power in the background as an unlimited source of inspiration and apparent wealth, it seems desirable to find out whether the relation between the states and the nation can be gradually changed through acts of congress until it is, in fact, if not in theory, like that between cities and towns or counties and a state government. Of course, the economic and political pressure resulting from the increase of states from 13 to 48 of varying size, population,

wealth, historical background and traditions, has increased tremendously the difficulty and complexity of the problem.

In one of William G. Sumner's essays he said:

"The type and formula of most schemes of philanthropy and humanitarianism is this: A and B put their heads together to decide what C shall be made to do for D . . . I call C the Forgotten Man."

Whether we accept that statement as to individual activities or not, it has a good deal of significance as applied to American states today, with the addition that states A and B, as well as D, wish to become the general beneficiaries of C.

Friction between the states existed under the Articles of Confederation and one of the purposes of creating the national government was to check and control such friction. If the so-called "new nationalism" (see "American Bar Association Journal," Nov., 1921, p. 601) becomes sufficiently extended under a congressional practice of "federal aid," or some other ingenious and persuasive phrase for using the power of congress to tax, and to distribute the contents of the treasury, a new form of friction through political pressure in congress may develop to such proportions as to complicate and weaken the entire structure. Is such a development and result contemplated by the constitution?

Those who are interested in these problems will do well to read Sumner's essay on "Advancing Social and Political Organization in the United States" in the volume of collected essays entitled "The Challenge of Facts and Other Essays." Whether we agree with some of the views which he expresses or not, his analysis and suggestions in regard to economic and social history and tendencies seldom fail to excite interest or controversy which may lead us to a more balanced and more cheerful judgment as to the future.

However much they fought each other while they were alive, we can imagine the shades of Thomas Jefferson and John Marshall standing together and each holding up a finger of warning!

F. W. G.

*Note.*

In this connection, the following sentences from an address of Hon. Frank O. Lowden, former governor of Illinois, recently quoted in the newspapers, are worth considering.

“Federal aid, generally speaking, is a bribe offered to state governments to surrender their own proper functions.

“There is scarce a domain in the field of government properly belonging to the municipality or the state which the federal government is not seeking to invade by the use of the specious phrase ‘federal aid.’

“The bureaus in Washington tasted the delights of power over fields which before had been exclusively occupied by the states. Propaganda, that new-found weapon of all causes, good and bad, was employed to perpetuate these new powers.

“If the number of public employes continues to increase as rapidly as it has in late years we will, within a reasonable time, witness the phenomenon of our population divided into two classes, those holding public office, a minority, and all others working to support the minority in office.”

“ . . . the state should be compelled to provide its own funds for purely state needs. The federal government should appropriate only for those interests which are purely of national concern and clearly within the purposes for which the federal union was established. No more expensive phrases have been invented in recent years than ‘state aid and federal aid’.”

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*Note*

Representative Shattuck has done a public service by leading the opposition at the State House, producing the figures as to the relative contribution of Massachusetts in Federal taxes and warning us as follows:

“We are often told that if we will appropriate a certain sum the federal government will ‘give’ us an equal sum. But this federal money is not really a gift. It is a return of perhaps 30 cents on each dollar of additional federal taxes collected from our citizens to meet the total outlay among the several states. By every such transaction we lose, and the majority of the states gain.”



STATEMENT AS TO THE FOLLOWING REPRINT FROM THE  
"CONSTITUTIONAL REVIEW."

The activities of the national, state, and city or town governments have developed to such an extent that to most of us they resemble a three-ring circus, and our seats at the performance are so far away from the national ring in Washington that we know very little of what is going on there, except for occasional glimpses of matters which have sufficient dramatic interest to provide news items in the press. For some time most of this news has related to international affairs. Accordingly, there are few men in Massachusetts, not members of congress, who know that 25 proposals to amend the Constitution of the United States were introduced in congress in 1921, not to speak of the various attempts to amend that Constitution indirectly by statute which are constantly being made under the guise of the "public welfare" or "federal aid" or otherwise. Therefore, reprints of the following review of such proposals which appeared in the "Constitutional Review" for January, 1922, were obtained and are here presented without comment for the information of the bar.

F. W. G.

# Proposals to Amend the Federal Constitution

*Reprinted by permission from "The Constitutional Review" for January, 1922.*

The following is a review of the joint resolutions proposing amendments to the Constitution of the United States which were introduced in the two houses of Congress in the first session of the Sixty-Seventh Congress, April—November, 1921. They numbered twenty-five in all, though some of these were duplicates. In general it may be said that some of them were of the perennial variety, being presented regularly in each successive Congress with no prospect whatever of adoption. Some were very obviously born of a supposed emergency or reflected a passing popular impulse. Some would introduce structural changes in the frame of the government. Others, finally, show a desire to break down the guaranties of the Constitution, either by vesting direct law-making power in the electorate or by facilitating the process of changing the Constitution. To the first category belongs Mr. Gillett's proposal (H. J. Res. 137) that: "Polygamy and polygamous cohabitation shall not exist within the United States or any place subject to their jurisdiction," a proposal which seems to have long survived the facts which may have prompted it, unless, indeed, monogamy is not yet fully established in the Philippines. We also recognize a familiar idea in H. J. Res. 176 (Mr. Madden) which would insert in the Constitution a provision that: "The President shall have power to disapprove any item or provision of an appropriation bill and approve the remainder." The agitation for this en-

largement of the executive power over legislation began with a message of President Grant in 1873, and has never since been wholly abandoned. It is true that a large majority of the states now have a similar clause in their constitutions. But the need for it in the federal Constitution is much less apparent since President Wilson's experience in the summer of 1918, when he vetoed three of the great appropriation bills because of his objections to separate items in them, and they were promptly modified by Congress to meet his criticisms and passed anew. Besides, the budget system, which we now have, is the true answer to the problem which this proposal supposes. Another old-timer reappears in Senator Harris' proposal (S. J. Res. 86) that: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of six years, and no person hereafter elected shall be eligible to re-election."

Among the proposed amendments which we have spoken of as arising from an emergency or from a popular impulse, it is easy to classify the joint resolution introduced in the House by Mr. Mason (H. J. Res. 35) as follows: "That Congress shall have power to prohibit or regulate the employment of children under the age of sixteen years." Events still fresh in the memory of all will likewise account for H. J. Res. 188 (Mr. Herrick) that: "Any election, whether the same be a primary election or a general election,

at which a candidate is nominated for or elected to any federal office, shall be deemed to be a federal election in so far as any person aspiring to any federal office is concerned, and all federal laws governing elections are hereby extended to primaries as well as to general elections in which a candidate, if nominated will become a candidate in a general election for a federal office." Mr. Bryan's idea of submitting the question of war to a vote of the people found a repercussion in S. J. Res. 89 (Senator Ladd) that "except in case of invasion or when the danger is so imminent as not to admit of delay, the Congress shall not exercise the power to declare war or to declare the existence of a state of war until such question shall have been submitted to a vote of the qualified electors in the several states. The President shall have power, by and with the advice and consent of the Senate, to enter into treaties with foreign powers, agreeing that neither of the contracting parties will declare or levy war against the other until the question of declaring or levying war shall have been submitted to the qualified electors of the country proposing the same and shall have been approved by a majority thereof. Treaties made in pursuance of this section shall be binding upon the government of the United States and all of the departments and offices thereof so long as observed in good faith by the other signatory power."

There may, however, be substantial merit in the proposal to enlarge the definition of treason as now contained

in the third section of the third article of the Constitution. This provision, if amended in accordance with H. J. Res. 197 (Mr. McKenzie) would read thus: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort; or in giving the enemies of the United States or those in rebellion or insurrection against the authority of the laws thereof aid and comfort by injuring the military, physical, or financial resources of the United States."

More than two years ago we said in these columns that "the case of the District of Columbia presents the strangest anomaly in the whole range of our political institutions, since its citizens are absolutely excluded from all participation in the executive and legislative branches of the government." And we quoted a prominent Washington newspaper as saying that "the 400,000 Americans of the District constitute the only community in all the expanse of the continental United States—populous, intelligent, public-spirited, of adequate resources—which is denied representation in the national government." Much interest in the plight of the District has grown since then, and as this is written hearings are in progress upon Senator Jones' resolution (S. J. Res. 133) which would add a section to the Constitution in the following terms: "The Congress shall have power to admit to the status of citizens of a State the residents of the District constituting the seat of government of the United States created by Article I, Section 8,

for the purpose of representation in the Congress and among the electors of President and Vice-President, and for the purpose of suing and being sued in the courts of the United States under the provisions of Article III, Section 2. When the Congress shall exercise this power, the residents of such District shall be entitled to elect one or two Senators as determined by the Congress, Representatives in the House according to their numbers as determined by the decennial enumeration, and presidential electors equal in number to their aggregate representation in the House and Senate."

In almost every Congress proposals are introduced for changing the arrangements of the Constitution with reference to the legislative branch of the government. Those presented in the period under review had to do mostly with the appointment or tenure of Representatives. Senator Ball (by request) offered the following joint resolution (S. J. Res. 47): "Representatives shall be apportioned uniformly among the several states upon the completion of each decennial census according to the votes counted at the presidential election next preceding such apportionment, and each state shall have at least one Representative." A more radical change, both as to apportionment and tenure, was proposed by Mr. Campbell in the House (H. J. Res. 226), who offered a new article for adoption, as follows: "Beginning with the members of the House of Representatives for the Seventy-seventh Congress, Representatives shall be chosen every fourth year.

The unit of population for each member of the House of Representatives for the Seventy-seventh and each succeeding Congress shall be one three-hundredths of the population of all the states as determined by the census of 1930, and each state shall have as many Representatives as the number of times (disregarding fractions) its population as determined by such census is divisible by such unit; but each state shall have at least one Representative. In the year 1970 and every thirty years thereafter, upon the request of not less than one-half of the states, and upon the admission of a new state, the unit of population shall be determined and a reapportionment made by the Congress according to the last preceding census." Mr. Kline's resolution in the House (H. J. Res. 220) proposed the lengthening of the term of Representatives to four years, but did not undertake to determine their number or the method of apportionment. To avoid the necessity of calling a special election in a state when a vacancy happens in its representation in the lower house, the joint resolution of Mr. Appleby (H. J. Res. 139) offered the following as a substitute for the existing provision: "When vacancies happen in the representation of any state, the executive authority thereof may make temporary appointments until the next general election, at which time such vacancies shall be filled."

It is hardly an exaggeration to say that no session of Congress passes without the introduction of proposed amendments designed to weaken or undermine the federal judicial system.

Senator Sheppard's contribution (S. J. Res. 94) took the form of a proposed amendment of the Constitution as follows: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The judges of the Supreme Court shall hold their offices during good behavior. The judges of the inferior courts shall hold their offices for such terms as Congress may prescribe, said terms to be not less than ten years."

Events connected with the adoption of the last two amendments brought forth a variety of proposals to revise the amending clause of the Constitution. It will be remembered that the constitutions of two states (Florida and Tennessee) provide that a proposed amendment to the federal Constitution shall not be ratified by the legislature unless it was elected after the submission of the amendment and may thus be supposed to carry a mandate of the people. But this restriction was adjudged ineffective, on the ground that it is not in the power of a state to add to or subtract from the requirements as to the ratification of amendments contained in the fifth article of the Constitution itself. Again, in at least one state (Ohio) the question was raised whether a provision in the state constitution for a popular referendum on legislative measures could be invoked to require the submission to popular vote of the action of the legislature in ratifying a federal amendment. And there and elsewhere there was argument concerning the power of

a legislature (or of a popular vote on a referendum) to reverse or recall a ratification once given. To cover these points a joint resolution was introduced in the House, April 21, 1921 (H. J. Res. 69, by Mr. Garrett, of Tennessee) and in the Senate, April 27, 1921, (S. J. Res. 40, by Senator Wadsworth) which would add to the present amending clause of the Constitution the following proviso: "That the members of at least one house in the legislatures which may ratify shall be elected after such amendments have been proposed; that any state may require that ratification by its legislature shall be subject to confirmation by popular vote; and that, until three-fourths of the states have ratified, or more than one-fourth of the states have rejected or defeated, a proposed amendment, any state may change its vote."

In support of this so-called "second bill of rights amendment" its advocates have published facts and figures, some of which we proceed to quote, submitting them to the consideration of the reader without comment, favorable or otherwise, but with the remark that we have not verified the statistics presented. "In the state constitutions" they say, "the people have protected themselves from legislative misrepresentation by requiring that all state amendments shall be submitted to popular vote or to special constitutional conventions. But on federal amendments the people have no protection against legislatures that betray their will. This is because the federal Constitution can be amended, not only by

conventions, but by legislatures, thus disfranchising the people. Congress can submit any amendment to special conventions of instructed delegates chosen by the people. The original Constitution was submitted and ratified in this manner, which amounts to a referendum. But Congress has not submitted any amendment to conventions since 1861. All recent amendments were submitted to state legislatures, and no private citizen in all the land has been allowed to vote on any of them. \* \* \* There are only 7,403 men in the 48 state legislatures, of whom 1,760 are state senators and 5,643 are state representatives. It does not require a majority even of these 7,403 men to ratify a federal amendment. It requires only a majority in 36 states—frequently merely a matter of a quorum in 36 states. A majority in 36 state legislatures may be obtained (all members present and voting) with 673 state senators and 1,643 state representatives, or 2,316 legislative votes in all, which is less than 32 per cent even of the 7,403 legislators in the 48 states. That is, any lobby or organized group which can control 2,316 men in 36 legislatures, by threats, blackmail, bribery, or other corruption, has the Constitution of the United States at its mercy and a strangle-hold on the American people. On the other hand, 167 men in 13 state senates (or 439 in 13 lower houses) can prevent the adoption of any federal amendment that the people want, even though both houses of Congress and 90 per cent of the voters might favor it. Thus any lobby that

can control 2,316 legislative votes can not only put over a federal amendment on the American people without their consent, but after the amendment is adopted, if the lobby can continue to control 167 votes in 13 state senates, it can prevent the 105,000,000 people of the United States forever from repealing the amendment thus fastened on the nation over their heads."

Other joint resolutions on the subject of the method of amending the Constitution were introduced, some of them less radical than the one just quoted, others more so. Mr. Siegel's proposal (H. J. Res. 29) would require an amendment to be "ratified by the people of three-fourths of the several states" instead of by the legislatures as now. H. J. Res. 12 (Mr. Griffin) would require ratification "by the people of three-fourths of the several states, the electors of which shall have the qualifications requisite for electors of the most numerous branch of the state legislatures." The proposal of Mr. Kissell (H. J. Res. 118) was that "the ratification in each state shall be made at any election for Representatives (held more than nine months after the amendment is proposed) by a majority of the electors qualified to vote for Representatives and voting on the question of ratification." Another plan was offered in H. J. Res. 21 (Mr. MacGregor) to the effect that Congress should be required to call a convention for proposing amendments "upon the application of the people of two-thirds of the states by a referendum of the electors of such states;" but that in either case, whether

amendments were proposed by Congress or by conventions so summoned, they must be "ratified by the people of three-fourths of the several states, who shall express their approval or disapproval of the proposed amendment by a referendum vote of the electors of the several states." Another joint resolution of Senator Wadsworth (S. J. Res. 21), in addition to requiring the election of the ratifying legislature after the submission of the amendment, and in addition to a provision for the confirmation of its action by a popular vote, contained this proposal: "That when any amendment shall be rejected or defeated in more than one-fourth of the several states, the same may not be again proposed within two years."

Senator Owen renewed his proposal for a "gateway" amendment (S. J. Res. 14). It provides, in substance, for the submission of an amendment or the calling of a convention (1) by a majority vote of the members enrolled in each house of Congress, (2) by either house alone if the other house twice rejects the proposal, "and a failure for three months to act favorably shall constitute a rejection," or (3) by Congress on the request of a majority of the state legislatures. In either case, the amendment is to be submitted to popular vote in the states, "and the will of a double majority shall prevail—a majority of those who vote on the measure in a majority of the congressional districts and a majority of all the votes cast thereon." Mr. Morin (by request) in the House of Representatives offered a joint resolution for an amendment introducing the direct

popular initiative into the federal Constitution. His proposal (H. J. Res. 110) was that a petition signed by 500,000 bona fide voters of the United States should require the submission to popular vote of any "proposed constitutional amendment or federal statutory law" at the next regular congressional election, but that if a million voters signed the petition, a special election on the question should be called and held, in either case the affirmative vote of a majority of the people voting on the question being sufficient for the adoption of the "proposed constitutional amendment or federal statutory law."

But of all the proposed amendments offered in this session of Congress that which seems most likely to be submitted for ratification is one which would give Congress the power to lay taxes on the income derived from state and municipal securities, at present exempt. Mr. McFadden's original joint resolution (H. J. Res. 102) offered in the House May 3, 1921, and in the Senate in substantially the same form by Senator Smoot, August 5 (S. J. Res. 97) appears to have been superseded by his revised and now pending proposal (H. J. Res. 211, October 25, 1921), which reads as follows: "The United States shall have power to tax incomes derived from securities issued after the ratification of this article by or under the authority of the several states to the same extent that income derived from securities issued after the ratification of this article by or under the authority of the United States are taxed by the United States. Any state shall

have power to tax incomes derived by residents thereof from securities issued after the ratification of this article by or under the authority of the United States to the same extent that incomes derived by residents of such state from securities issued after the ratification of this article by or under the authority of such state are taxed by such state."

Without doubt the sentiment in favor of this change in the fundamental law received a strong impetus from its commendation by President Harding in his annual address to Congress, December 6, 1921, though it is to be hoped that his counsels of care and deliberation will not pass unheeded. He said: "Many of us belong to that school of thought which is hesitant about altering the fundamental law. I think our tax problems, the tendency of wealth to seek non-taxable investment, and the menacing increase of public debt, federal, state, and municipal, all justify a proposal to change the Constitution so as to end the issue of non-taxable bonds. No action can change the status of the many billions outstanding, but we can guard against future encouragement of capital's paralysis, while a halt in the growth of public indebtedness would be beneficial throughout the whole land. Such a change in the Constitution must be very thoroughly considered before submission. There ought to be known what influence it will have on the inevitable refunding of our vast national debt, how it will operate on the necessary refunding of state and municipal debt, how the advantages of nation over state and municipality, or the contrary, may be

avoided. Clearly the states would not ratify to their own apparent disadvantage. I suggest the consideration because the drift of wealth into non-taxable securities is hindering the flow of large capital to our industries, manufacturing, agricultural, and carrying, until we are discouraging the very activities which make our wealth."

But it is well known to every intelligent citizen that the federal income tax laws since 1913 have been framed with a purpose to pillage the rich. The results have been far different. If the men of great wealth had been called upon to contribute their *just* share of the burden of taxation, their surplus income and accumulations would have been directed into productive channels of industry, thus creating ever more and more wealth to bear its share of the taxes. The choice of the rich man would have been between investing his surplus in exempt securities at a very low rate of interest or investing it in new or expanding industrial enterprises with the prospect of very large returns. And human nature would have dictated the answer with very little hesitation. But the actual choice of the rich man, as our tax laws stand, is between investing in non-taxable securities or surrendering more than half his income to the government. And again human nature, reacting against a vicious and confiscatory plan of taxation, dictates the answer. It would be difficult to confute the statement of Mr. Otto H. Kahn, in an open letter to Senator Lenroot, that: "There is but one effective way of stopping the huge exodus which has been going on and



continues ever increasingly to go on, of capital into the haven of tax-exempt securities, and that is, so to reduce surtaxes as to remove the immensity of the advantage now offered by such securities." The proposed change in our Constitution would be highly danger-

ous; its effect upon the states would be incalculable in advance. It ought never to have been necessary. Perhaps even now it would not be necessary, if only hatred and spite against the wealthy men of the country were tempered by economic common sense.

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## Some Recent Acts of Congress and Their Relation to the Constitution

The Constitution carefully enumerates the subjects of legislation which are within the competence of Congress and adds such auxiliary powers as may be "necessary and proper for carrying into execution" the granted powers, but reserves all others to the states or to the people. A spirit of true obedience to the Constitution would restrain Congress from straying into the territory withheld from its jurisdiction. But the general demand for "nation-wide" laws on a great variety of subjects has often induced the federal legislature, especially in recent years, to attempt by indirection what it is not directly authorized to do. The device is to select some one of the broad grants, such as the commerce clause or the taxing power, and use it as a shield or cover for a statute which otherwise would not be permissible. The Harrison Anti-Narcotic law, for instance, is coated with a thin veneer of constitutionality by calling it a revenue act. The act for the protection of migratory game birds hangs precariously from the treaty-making power. So, in 1916, Congress passed an act prohibiting or regulating the employment of child labor in industries in the states.

But the Supreme Court, two years later, refused to sanction the pretense that this was a regulation of interstate commerce, and held the statute invalid. (*Hammer vs. Dagenhart*, 247 U. S. 251.) Thereupon Congress inserted a similar provision in the Revenue Act of 1918, but now, shifting the ground, sought to make federal control of child labor effective by imposing a prohibitive tax (ten per cent) on the profits of the employers of such labor. This legislation has in turn been pronounced unconstitutional by Judge Boyd in the United States District Court in North Carolina (*George vs. Bailey*, 274 Fed. 639). The judge fully recognized the excellent purpose which animated Congress in these enactments, a purpose which cannot fail to commend itself to every person of humane instincts. But he could not shut his eyes to the fact that the Constitution does not warrant any such action. "The question which suggests itself in the outset," says the opinion of the court, "is whether the last act is intended to raise revenue. It will scarcely be insisted that such is its object. It is more reasonable to conclude that the purpose of the tax feature is to impose a penalty in order to

deter the violation of the child labor provision. It would be a rather non-productive revenue system which imposed taxes the effect of which would be to annihilate the subject of taxation, or to prohibit the exercise of the privilege for which the tax is levied." Quoting a statement by the Supreme Court that "the control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution," Judge Boyd continued: "If that principle applies to the authority of Congress in the regulation of commerce, there is no reason why it should not apply in raising revenue by taxation, for the power delegated to the United States to levy and collect taxes is no more elastic than the power delegated by the commerce provision. Nowhere in the Constitution can be found authority to the national government to regulate labor within the states. The conclusion seems to be irresistible that the national legislature cannot do indirectly that which it is forbidden by the Constitution to do directly; and it being definitely determined by the highest court of the land that the right to regulate labor is inherent in the states, then Congress cannot intervene to control it, either by way of interstate commerce, efforts to levy taxes, or by any other method." Of course this decision is not final, since it is subject to appeal, and it may ultimately reach the Supreme Court. But it would be very hard to find solid grounds of dissent from Judge Boyd's conclusions.

But the temptation is very strong to use the almost unrestricted taxing

power for the accomplishment of objects having nothing to do with the raising of revenue. Limitations of space forbid a full discussion here of this important subject. But attention may be called to one of the latest manifestations of this device. The "anti-grain-gambling" bill, sponsored by Senator Capper, has been passed and was approved August 24, 1921. It is entitled: "An Act taxing contracts for the sale of grain for future delivery and options for such contracts, and providing for the regulation of boards of trade." It is meant to prevent artificial interference with the law of supply and demand in the sale and distribution of grains and to stabilize the market. It provides for government regulation of the grain exchanges under the direction of the Secretary of Agriculture; it directs the keeping of books showing accurately all the transactions on the exchanges, to which the Secretary or his agents shall always have access; and it provides that the Secretary may designate such boards of trade as "contract markets," where grain futures may be dealt in, only when these boards comply with conditions and requirements set down in the act. But its real purpose is to use the taxing power of the United States to suppress gambling in grain. To this end it imposes an entirely prohibitive tax of 20 cents a bushel on every privilege or option for a contract either of purchase or sale of grain, provided the transaction comes within any of the well-known trade designations of "privileges," "bids," "offers," "puts and calls," "indemnities," or "ups and downs."

If Judge Boyd's principle is right, as above referred to, that the power of Congress to lay and collect taxes, duties, imposts and excises is no more elastic than the power to regulate commerce, and does not authorize the exercise of authority not entrusted to Congress by the Constitution, it must be conceded that the constitutional validity of this act is open to serious question. It gains no support from the provision in the Constitution that the power of taxation is given to the national government "to pay the debts and provide for the common defense and general welfare of the United States." For this means that the *purpose* of taxation must be provision for the public debt or for the common defense or general welfare of the country. Taxation for any other purpose, such as the suppression of gambling, is unauthorized and void. And lest it be thought that the reference to the "general welfare" should lend any strength to an otherwise invalid act, it should be remembered that the Constitution does not give to Congress any general power to promote the general welfare. If it did, all the rest of the Constitution would be entirely nugatory. For the grant of such a power would be so illimitable that all restrictions, enumerations, or reservations would be no more than foolish and empty words. The only common-sense interpretation of the Constitution is that Congress can provide for the general welfare *only* by the wise and beneficial exercise of the powers of legislation which are specifically committed to it.

To which of these powers, then, can we refer the Capper grain-gambling act? It is not even pretended that it has any relation to the regulation of foreign or interstate commerce. And the other granted powers—naturalization, coining money, establishing post offices, granting patents and copyrights, and the war powers—all seem equally foreign to its scope. It must stand or fall as an exercise of the taxing power; and, for the reasons stated, we believe it to be entirely indefensible on this ground.

The validity of laws regulating the relation of landlord and tenant, particularly in regard to the amount of rent which may be demanded, at least in case of an "emergency" in the housing situation, seems to have been settled by late decisions of the Supreme Court, though it is not impermissible to remind ourselves of the dissent very vigorously expressed in those cases by the late Chief Justice and three of his associates. But an Act of Congress approved August 24, 1921, extending for a period of seven months the act regulating rents in the District of Columbia, contains a provision which, to the mind of the instructed lawyer, must appear little less than amazing. It is that an owner of rented property who has sued for and obtained a judgment against his tenant for rent which is in excess of the amount fixed as "reasonable" by the Rent Commission "shall move to vacate such judgment, to the amount of such excess, within 60 days after this section takes effect. In case such motion is not made, and such owner does not exercise reasonable dili-

gence to have such judgment vacated, such judgment, to the amount of such excess, *shall be null and void.*" It is to be hoped that no one will be blind to the dangerous possibilities of the power here asserted. It is a claim by Congress of the authority to vacate the judgment of a court of justice duly pronounced. If such a power be conceded, what measure of independence can possibly be left to the judiciary? If the decision of a court contrary to the finding of an administrative commission can be annulled by the legislative power, why have any courts? If the citizen's successful assertion of what he claims to be his right, and its due award by a court, can be reversed by legislative fiat, of what benefit to him is his right? If Congress can thus annul the judgment of a local court of the District of Columbia, why cannot it equally annul the judgment of any federal court, including the Supreme Court?

The Sheppard-Towner act, approved November 23, 1921, does not pretend to base itself upon the commerce clause, the taxing power, or any other specific grant of authority to Congress. It is entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy." It simply appropriates money out of the federal treasury, to be paid over to the several states "for the purpose of co-operating with them in promoting the welfare and hygiene of maternity and infancy," and creates a commission or board to apportion the funds among the states and to "make such studies, investigations, and reports as will promote the efficient ad-

ministration of this act." In respect to its constitutional validity it quite closely parallels the child-labor-tax law, but it does not even wear the mask of a revenue measure. It might have proceeded on the extravagant theory that, whatever limitations were placed upon the range of subjects over which Congress has legislative power, there is no limitation on its power to appropriate money. But the debates on its passage in the House plainly show that its supporters claimed for Congress the power to legislate broadly for "the general welfare." One of its chief advocates is reported to have said, in debate: "Objections have been raised to this measure on the ground that it is unconstitutional. If it has no other basis, constitutionally, for its legality, it is surely based upon the preamble of the Constitution, which gives Congress power to provide for the general welfare of the people of the United States." He was challenged with this question: "Can we not just as readily, under the general welfare clause of the Constitution, have a bureau in Washington for the foodless, another bureau for the clothesless, another bureau for the homeless, and under that general welfare clause do anything that the most radical socialist in the world demands?" To which he replied: "I am inclined to think that under the general welfare clause Congress could do all those things without violating the Constitution. Whether it desires to do them is another question."

Perhaps already in this article enough has been said to show the utter futility of appealing to the general wel-

fare clause as a basis for legislation which Congress could not otherwise enact. Once admit that this general expression in the preamble contains a grant of power, and all restrictions and limitations vanish, the Tenth Amendment becomes an unmeaning babble, and all the rest of the Constitution, except what relates to the mere frame of government, is reduced to the impotence of mere advice. It is, then, the mere will of Congress, and not anything in the Constitution, that supports the Sheppard-Towner Act.

About the same time there was passed the act supplemental to the National Prohibition Act, and commonly called the "anti-beer" Act. This provides that no revenue officer "shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search." But it leaves all other searches and seizures to the free discretion or arbitrary will of such officers without warrant. Without further discussion of this point, it may be observed that this provision falls very far short of compliance with the full scope of the Fourth Amendment. And any relaxation of any of the guaranties of the Bill of Rights is fraught with danger to the liberties of the people—if indeed they have any liberties left. It is worth while to remind the reader that the Fourth Amendment runs thus: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable

cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

If legislative bodies will not respect the plain limitations of the constitutions, it is natural for those who understand and believe in the American system to look to the courts, the appointed guardians of the constitutions, for a remedy. But even at the risk of being called pessimistic and reactionary, we must express our conviction that too many of our courts (not all) are showing a strong disposition to acquiesce in whatever the legislative department may choose to enact. Whether they are misled by a specious philosophy or are in awe of the unreasoning multitude, it is not for us to say, but the tendency cannot be denied. It was very recently that an eminent and learned federal judge, in speaking of the war-time tax acts of Congress, said: "The powers of Congress are to be interpreted, not by dialectical ingenuity, but by current practices of nations in the exercise of similar powers. It is true that these powers are limited and that those limitations must be observed, however little they circumscribe the analogous powers of other legislatures. Yet when the question is of the interpretation of *those broad counsels of moderation contained in the Fifth Amendment*, we must interpret the limitations themselves with an eye to the practices which have become tolerated elsewhere among civilized nations. Were it not so, we should be limited forever to the political usages of 1789, and those amendments which

were intended to protect the individual against extravagant or invidious discrimination would become a strait-jacket upon the nation's freedom." This is perhaps the first time since Magna Charta that the categorical negatives of the Fifth Amendment have been called "counsels of moderation." If they are nothing more than advice to the legislature, and need not be heeded in any other sense, then the kind of government we have always supposed we had has become transformed by a silent revolution.

But if that is the case, we shall have to fall back upon the last line of defense, the intelligence and conscience of the citizens themselves. As has lately been said by a former Attorney General: "That protection which, in the earlier period of our national history,

was furnished by the courts, henceforth must be looked for in the legislature. Never before in our history has it been more vital to the individual citizen that legislative bodies, state and national, should be representative of the best intellect and character of our people. With a sense of responsibility of which the legislature no longer is relieved by the courts, legislation should be more cautiously framed, more wisely conceived, and more justly enacted than ever before. But the citizen must henceforth be the guardian of his own liberty, for the ancient protection embodied in the formulae of individual rights, interpreted and enforced by judicial tribunals, no longer can be depended upon as barriers against collective wishes or group desires."









## SOME EARLY LAWYERS OF MASSACHUSETTS AND THEIR PRESENT INFLUENCE IN THE THE LIFE OF THE NATION"

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(Introductory Note:--The following address was delivered before the members of the Maryland State Bar Association at their annual meeting at Cape May, New Jersey, on July 1, 1921. While it was prepared primarily to interest and entertain the members of the bar of another State with an account of some of the Massachusetts men whose work deserves serious study today, it contains some forgotten information about these men which may interest those citizens of Massachusetts who have not read of it before and even those who have may like to have it called again to their attention from a point of view which has generally been overlooked. Accordingly, the address is reprinted by permission.—F. W. G.)

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*Ladies and gentlemen and brethern of the  
Maryland State Bar Association:*

I have been asked to come and talk to you about some early Massachusetts lawyers and their present influence in the life of the nation.

One who is invited to the state of Samuel Chase, Luther Martin and William Pinkney to talk of early lawyers of the Republic from another state will do well to be careful in applying superlatives to his heroes. But we must remember that "one star differeth from another star in glory," and that so much hard thinking was needed in that constructive period that there was work enough for all who had the capacity and character to do it. No emphasis on this or that figure in my story should be understood, therefore, as a dogmatic assertion of comparative greatness. I shall speak as a practical student of men from whom I have learned something about our Gov-

ernment. I believe they all deserve more study than they receive today.

Some one has said somewhere that the strength of the common law lay in its development by judicial action with the assistance of a keenly critical bar. When the American bar, as a whole, has so neglected its critical function and weakened its influence that so peculiar a constitutional provision as the Eighteenth Amendment to the Constitution of the United States got itself submitted and adopted apparently on the convenient principle of "Passing the buck" or "Let George do it"; and when the Supreme Court of the United States delivers a judgment upon its scope and effect without giving reasons, individual members of the bar may, perhaps, be pardoned for wondering what John Marshall and his contemporaries would have said. I have listened to a good deal of pessimism from lawyers, but it seems time for the bar to drop the cynical pose of the pessimist and to put some heart into the exercise of that critical faculty, both of a constructive and negative character, which is one of their natural public functions and the education in which has been called the most important education that there is in the interest of good citizenship. Owing to the limitations of human nature which control during a war, and for some time after, we have been living, from force of circumstances, under a sort of "gentlemen's agreement" that constitutional rights should be more or less in abeyance and superseded by duties dictated largely by men and circumstances rather than by laws. We may think what we please of the constitutional reasoning for or against the Eighteenth and Nineteenth Amendments; but we cannot ignore the fact that the principle of local self-government in America is seriously threatened by the habit of running to Washington for everything. At a time when England is apparently on the verge of decentralizing some of the functions of Parliament we should remember that Washington has too much to do now. Hitherto our dual system of government has proved a great stabilizing force and it is important that it should be preserved.

I venture to express the belief that the future looks no more uncertain to us today than it did at times to some of the men, of whom I shall speak, between 1760 and 1790, and indeed for a good many years after that. I speak, therefore, in a cheerful spirit. I once heard the late Ambassador Page address an English audience on "American Democracy." He told them to remember that we were a large body of good-natured, rather

easy-going, humorous-minded people; that "every now and then some dramatic incident attracted our attention to something wrong and we turned to and fixed it, and meanwhile all kinds of other things might be going wrong until some other dramatic incident attracted attention to them." Thus we developed in a "peace-meal" fashion. Just at present it looks as though the distinguished gentleman referred to in the press yesterday as "Hell and Maria" Dawes was a dramatic incident as well as a constructive force.

In his history of "England under the Stuarts" (p. 122), Trevelyan speaks of Lord Coke as having "turned the minds of the young gentlemen at the Inns of Court \* \* \* to contemplate a new idea of the constitutional function and of the political affinities of their profession, which they were destined in their generation to develop in a hundred ways as counsel for England gone to law with her king."

It is doubtless true that economic conditions, with a surface of dramatic incidents, are at the basis of history, but, so far as the history of a state or nation is based on written documents, as reflecting the more permanent sentiments of the people, that history takes a new start in the minds of the men who thought out the practical application of ideas and who drew the papers. Accordingly, I am going back to tell you of some forgotten men and of some of the forgotten work of other men in the constitutional history of Massachusetts—men who led and still lead in many ways the sound, practical constitutional thinking—that intellectual influence, which forms, perhaps, the greatest contribution of Massachusetts to the growth of the Union.

I shall speak in chronological order of James Otis, of Thomas Allen, "the fighting parson of Berkshire County," who had a legal mind and a power of statement to which we owe much; of John Adams, not when he was President, but between 1775 and 1780, when he was in his early forties; of Theophilus Parsons, and of William Cushing.

#### JAMES OTIS.

James Otis was born in West Barnstable, on Cape Cod, about 1725. He was the brilliant, intellectual leader in Massachusetts politics for about ten years, from 1760-1770. In saying that he was "the" intellectual leader, I do not mean to suggest that the work of his associates was any less important or less necessary. I merely mean that their functions were different, and they knew it.

The way in which Otis and Samuel Adams worked together during this period is described in William Tudor's "Life of Otis," in connection with the so-called "circular letters," which were sent from Massachusetts to the speakers of the various colonial legislatures:

"They were drawn up by Otis and revised by Samuel Adams. \* \* \* This was the common course of proceeding when these two gentlemen were on a committee together. Otis, whose \* \* \* learning, quickness, keen perception, bold and powerful reasoning, made him the primary source of almost every measure, generally gave the first draft; Adams, who saw to everything and blended great caution with incessant watchfulness and exertion, revised, corrected and polished where it might be requisite. The reports were then submitted in course to the committee for their sanction. This process is known to have taken place in regard to these documents. A friend of Otis, having met him while they were in preparation, inquired respecting them. His answer was: 'They are nearly ready. I have written them all and handed them over to Sam, to quieuviue them.' By this term, which might puzzle the etymologists, he used to express this kind of revision, that he was too careless and impatient to undertake. \* \* \* There was no jealousy respecting these political productions. They all contributed what they were most able to do in their composition. The reputation of fine writing was too unimportant compared with the magnitude of the cause with which they were engaged to excite a minute's solicitude."

It was through writings thus prepared that the platform of revolt in support of American independence and the constructive ideas for the maintenance of that independence were gradually formulated and circulated in Massachusetts and elsewhere.

In 1878 Ralph Waldo Emerson delivered a lecture in the Old South Church in Boston entitled, "Fortune of the Republic." He began as follows:

"It is a rule that holds in economy as well as in hydraulics, that you must have a source higher than your tap. The mills, the shops, the theatre and the caucus, the college and the church, have all found out this secret. \* \* \* Wedgewood, the eminent potter, bravely took the sculptor Flaxman to counsel, who said: 'Send to Italy, search the museums for the forms of old Etruscan vases, urns, water-pots, domestic and sacrificial vessels of all kinds.' They built great works and called their manufacturing village Etruria. Flaxman, with

his Greek taste, selected and combined the loveliest forms, which were executed in English clay; sent boxes of these as gifts to every court of Europe, and formed the taste of the world. It was a renaissance of the breakfast table and china-closet. The brave manufacturers made their fortune. The jewelers imitated the revived models in silver and gold."

Bearing this passage in mind, let us turn to the philosophy of James Otis on the subject of government and see how he helped to "form the taste of the world."

The beginning of Otis' popularity and power was his argument in opposition to the Writs of Assistance in the Council Chamber of the Old State House in 1761, when he was about thirty-six years old. He resigned his position of Advocate General under the Crown in order to take part with his senior, Oxenbridge Thatcher, in opposition to the issuance of these writs. As you doubtless know, the writs applied for were practically general search warrants to assist the English customs inspectors in enforcing unwelcome regulations of commerce. It was this case and the attention which it attracted to the subject which resulted in the Fourteenth Article of the Massachusetts Bill of Rights and the Fourth Amendment to the Constitution of the United States prohibiting unreasonable searches, and it is interesting to note that this amendment has very recently been explained and enforced to the letter by the Supreme Court of the United States. But there were no such written provisions at that time and, in the case of Otis as well as of the other men to be mentioned, we must try to visualize their story as "the story of living forces" at a time when men were thinking themselves out of a condition in a country which was thinly settled, and in which the practical opportunities for acquiring and distributing information on horseback or by coach are perhaps best illustrated by the fact that when George Washington died, at the close of the century, the news did not reach Boston for eight days afterwards.

It fell to Otis to formulate the opposition on grounds of principle which would reflect the practical sentiment of the colonies by suggesting some constructive policy of restraint which should govern the exercise of sovereign power. It should be remembered that Otis was not preaching revolution. He was attacking a British Ministry as a subject of the Crown, and in so doing he unconsciously, but with prophetic instinct, foreshadowed the future development in America of what Dean Pound justly calls "the common law doctrine of the supremacy of law." He argued against the issuance of the

writes on the ground that they would violate the constitutional rights of an Englishman to protection in his house, and he asserted that acts of parliament which violated obvious practical principles of justice were void. He also argued that the acts of trade violated the Province Charter. These and the other aspects of his argument which were presented with all the resources of a man of unusual eloquence and wit, caught the imagination of those who heard it and of those to whom it was repeated. Otis became at once a hero and a target for abuse. He was elected to the legislature. His ideas were further developed in pamphlets which were circulated about the colonies.

Not least among the accomplishments of that argument in 1761 was the fact that it inspired the intellectual enthusiasm of the young John Adams, who, as he describes himself, was sitting in the court room "lost in admiration" and "looking like a short, thick archbishop of Canterbury."

Any one who reads over again today the pamphlets on "The Rights of the British Colonies" and others, written by Otis and doubtless "quieuviue'd" by Samuel Adams during the next few years, will be impressed, I think, with the fact that the mind of Otis was one of those minds in America which, like the mind of Coke in England in the earlier century referred to, "turned the minds" of lawyers "to contemplate a new idea of the constitutional function and of the political affinities of their profession." Those who read over these pamphlets and compare them with the account given by John Adams, himself, of the argument of Otis in 1761, and then compare them with the Declaration of Independence, the Massachusetts and other early State Constitutions, and the Constitution of the United States will understand better the characteristic sentence quoted by Josiah Quincy in his volume entitled, "Figures of the Past," from a letter written in 1818 to William Wirt by John Adams. In this letter Adams said, "If we must have panegyrics and hyperboles, I must say that if Mr. Henry was Demosthenes and Mr. Richard Henry Lee was Cicero, Otis was Isaiah and Ezekiel united."

Take, for instance, this sentence from his "Vindication of the Massachusetts Representatives" in 1763, "Although most governments are *de facto* arbitrary, and consequently the curse and scandal of human nature; yet none are *de jure*, arbitrary." There you have the underlying principle of American constitutional law adequately stated in one sentence as clearly as it ever has been or ever will be stated.

He elaborated this further in his pamphlet on "The Rights of the British Colonies" in 1764 as follows:

"Government is \* \* \* most evidently founded on the circumstances of our nature. It is by no means an arbitrary thing depending merely upon compact or human will for its existence. \* \* \* This supreme absolute power is originally and ultimately in the people. \* \* \* Tyranny of all kinds is to be abhorred whether it be in the hands of one, or a few, or of many" (pp. 8, 9).

"The end of government being the good of mankind points out its great duties. \* \* \* There is no one act which a government can have a right to make that does not tend to the advancement of the security, tranquillity and prosperity of the people. \* \* \* Men cannot live apart or independent of each other, \* \* \* and yet they cannot live together without contests. These contests require some arbitrator to determine them. The necessity of a common, indifferent and impartial judge makes all men seek one" (pp. 10, 11).

"The same law of nature and of reason is equally obligatory on a democracy, aristocracy and a monarchy. \* \* \* The grand political problem in all ages has been to invent the best combination or distribution of the supreme powers of legislation and execution" (pp. 13, 14).

After elaborating the right and duty of criticism by individual freemen and quoting freely from Locke, from the English Bill of Rights of 1689 and the Act of Settlement of 1700, he continued:

"To say the parliament is absolute and arbitrary is a contradiction. The parliament cannot make two and two five: Omnipotency cannot do it. \* \* \* Parliaments are in all cases to declare what is for the good of the whole; but it is not the declaration of parliament that makes it so: there must be in every instance a higher authority, viz., GOD. Should an act of parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void; and so it would be adjudged by the parliament itself, when convinced of their mistake. Upon this great principle parliaments repeal such acts, as soon as they find they have been mistaken, in having declared them to be for the public good, when in fact they were not so. When such mistake is evident and palpable, \* \* \* the judges of the \* \* \* courts have declared the act 'of a whole parliament void.' See here the grandeur of the British Constitution. See the wisdom of our ancestors.



The supreme legislature, and the supreme executive, are a perpetual check and balance to each other. If the supreme executive errs, it is informed by the supreme legislative in parliament: if the supreme legislative errs, it is informed by the supreme executive in the King's courts of law. Here the King appears, as represented by his judges, in the highest lustre and majesty, as supreme executor of the commonwealth; and he never shines brighter, but on his throne, at the head of the supreme legislative. This is government. This is a constitution to preserve which, either from foreign or domestic foes, has cost oceans of blood and treasure in every age: and the blood and the treasure have upon the whole been well spent."

This was a somewhat idealized vision when applied to the facts and merits Emerson's words in being "a source higher than the tap," but Otis constantly quoted Lord Coke, Lord Holt and others, and, as stated by Horace Gray in his note to Quincy's Reports (pp. 526-7):

"At the time of Otis' argument his position appeared to be supported by some of the highest authorities in English law."

It must be remembered that there were few law books at hand.

It is not material to what extent he was historically sound in the light of modern research and analysis in his reference to his precedents as to the test of the "law of God." Of course, he, as well as his successors, realized that that is a somewhat vague test to be applied by courts in such matters. The point is that the general sentiment of Massachusetts developed with the central idea, whether historically established or not, that courts could and should disregard legislation as void, if contrary to what they understood to be fundamental "constitutional principles," even though those principles were then *unwritten*. It was Otis who developed this idea as a practical principle from the suggestions of Coke and others.

Hutchinson, the Royal Chief Justice of Massachusetts, in 1765, speaking of the opposition to the Stamp Act, said:

"The prevailing reason at this time is that the Act of Parliament is against Magna Charta, and the natural rights of Englishmen, and, therefore, according to Lord Coke, null and void." (Quincy's Rep., 527 and 441.)

Thomas Paine, whose pamphlet "Common Sense" first appeared early in 1776, of which thousands of copies were printed and distributed throughout the colonies, after urging

a conference of representatives to frame a continental charter like Magna Charta, said, evidently reflecting the suggestions of Otis:

"Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth, placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far we approve of monarchy, that in America THE LAW IS KING." (Ed. February, 1776, pp. 47, 48.)

Thus did Otis help to "form the taste" of Americans for the constitutional principles of law and order at a time when there were none in practice.

#### THOMAS ALLEN.

The next man in the story is "The Fighting Parson of Berkshire County," who fired the first shot at the battle of Bennington and who had a legal mind. You will soon see why I mention him among the lawyers. Here we come to a character in the history of Massachusetts who is almost utterly unknown outside of his own county, even by members of the Massachusetts bar; yet, it is probable that the existence of the Massachusetts Constitution owes as much to Thomas Allen as an initiative force as it owes to John Adams and Theophilus Parsons, as draftsmen and constructive thinkers. Moreover, the bar of the country may well pause and reflect upon the meaning of the movement led by Thomas Allen in his county and upon some of the sentences from his pen which appeared in the documents submitted by the body generally described as "The Berkshire Constitutionalists."

I shall speak of the Massachusetts Constitution and of the relation to it of this man and his associates in Berkshire, because I have come here to speak to you, not in any mere spirit of antiquarian interest in some early Massachusetts thinkers, but, primarily, to direct your attention to the vitality of what they thought and its practical influence and importance today in the life, not only of the State, but of the nation.

In a carefully prepared unpublished thesis, written by Dr. Fred Emory Haynes in 1891, and now in the Harvard College Library, entitled, "The Struggle for the Constitution in Massachusetts," he traces the gradual development of conditions which led first to the attempt of the provincial legislature to draw up the proposed constitution of 1778 and of the subsequent defeat by the people of that loosely-drawn and in-

effective document, followed by the calling of the constitutional convention of 1780, which drew up the document finally adopted by the people in that year, Dr. Haynes concludes his study as follows:

"In 1777 James Warren wrote to Elbridge Gerry about the movement for a constitution. He said that 'no new form of government is yet adopted. Everybody seems to wish for it and a number are incessantly moving and pressing for it. What hinders, I don't know, except downright laziness.' This apathy or lack of energy seems to have developed into a strong opposition by the time of the meeting of the Convention of 1779, for a spirit of obstruction appears to run through all the proceedings of that body. \* \* \*

"In conclusion we may say that the three great factors of the constitutional history of Massachusetts Bay were: (1) The traditions and forms of self-government inherited by the people; (2) the Berkshire Constitutionalists; and (3) the Essex Junto. \* \* \* Anglo-Saxon tradition, Berkshire democracy and Essex conservatism gave us the venerable Constitution of 1780, \* \* \* second only in historical importance to the Federal Constitution of 1789."

That document of 1780 has been amended sixty-six times since 1780, many of the changes being matters of detail and the most important of them being those extending the spirit of religious freedom and toleration and those extending the electorate. But the body of it has survived the political storms of 140 years; and I believe that I do not exaggerate, when I express a conviction that it stands today as a great fortification in the immediate background of the Constitution of the United States.

Who was Thomas Allen and what did he do? The fullest account of him is found in the second volume of Smith's "History of Pittsfield." At a time of free thinking in political creeds and a chaotic state of public opinion as to any constructive measures needed to induce different parts of an extended and sparsely-settled country to live reasonably together, Rev. Thomas Allen is described as occupying an intermediate position between those minds which were patiently seeking material in the experience of the past and those minds which were seizing eagerly on the suggestions of popular essayists who were enthusiastically flattering everybody with the most advanced theories of human rights and the possibilities of unrestrained individualism. While sympathizing with the natural aspirations for individual freedom, Allen and his group of

hard-headed New Englanders in the Berkshire Hills had thought enough about human nature to realize that, while they had removed King George III from the American throne, they had put King Voting-majority in his place. They also realized that as a practical matter the power behind the throne of King Voting-majority in any general legislative body did then, and would in future, reside to a very considerable extent in the more thickly settled and commercially prosperous seaboard counties of Massachusetts. They feared this new king, and this power, as they feared George III, so far as the probable, practical results on the western counties of Massachusetts were concerned. They did not deceive themselves with mere glittering generalities of a spurious democracy. They knew they were facing a condition and not a theory, and they turned for leadership to a man who had a rare power of statement. This man was Thomas Allen and he had evidently read and pondered on the pamphlets of James Otis.

He led them not in a violently aggressive movement to disrupt the *de facto* government then existing, but in a respectful and firm demand for constructive action as a condition precedent to their acceptance of the government. The course which they followed was to demand a constitution or compact of government upon which they could rely for protection. In a statement written by Allen, they gave their reasons for demanding it and for their refusal to allow the highest court of the then-existing government to sit in Berkshire County until such a fundamental law had been adopted. As Berkshire County was on the borders of New York, with Yankee shrewdness they even held out the possibility of negotiations for joining New York as an alternative for the consideration of the men in the eastern counties. The result of their energy and determination, and undoubtedly of Allen's power of statement, finally resulted in the calling of the convention which adopted the Massachusetts Constitution. It should be said here, however, that to the town of Concord belongs the distinction of the first published demand for a constitutional convention of the modern type. The resolution of the town in 1774 will be found in the frontispiece to the Manual of the recent Massachusetts Convention of 1917. But Concord was in the east and the most effective demand came from Berkshire.

You will see later, I think, the exact significance which I attribute to all these forgotten proceedings. I am going to read to you a few of the paragraphs written by Thomas Allen in the Pittsfield resolutions during the years between 1776-

1779. In May, 1776, a petition, drawn by Allen, from the Town of Pittsfield was sent to the General Court sitting in Watertown reciting that:

"When they considered that the revolution in England afforded the nation but a very imperfect redress of grievances—the nation, being transported with extravagant joy in getting rid of one tyrant, forgot to provide against another—and how every man by nature has the seeds of tyranny deeply implanted within him, so that nothing short of Omnipotence can eradicate them.

"That when they considered that now is the only time we have reason ever to expect for securing our liberties and the liberties of future posterity upon a permanent foundation that no length of time can undermine,—though they were filled with pain and anxiety at so much as seeming to oppose public councils, yet, with all these considerations in our view, love of virtue, freedom and posterity prevailed upon us a second time to suspend the courts of justice in this country.

"That the first step to be taken by a people in such a state for the enjoyment or restoration of civil government among them is the formation of a fundamental constitution as the basis and groundwork of legislation.

"We beg leave further to represent that we by no means object to the most speedy institution of legal government through this province, and that we are as earnestly desirous as any others of this great blessing.

"That, knowing the strong bias of human nature to tyranny and despotism, we have nothing else in view but to provide for posterity against the wanton exercise of power, which cannot otherwise be done than by the formation of a fundamental constitution (pp. 352, 353).

"Let it not be said by future posterity that in this great, this noble, this glorious contest, we made no provision against tyranny among ourselves."

Such were the reasons for refusing to allow the highest court of Massachusetts to sit in Berkshire County.

In all the controversy that has raged about the so-called judicial "usurpation," in all the present output of alleged historical facts, or lack of facts and precedents about what is called the "power" of the courts to disregard unconstitutional legislation, I have never seen this story mentioned. Here we have not lawyers but a group of back-country laymen who refused to allow the courts to sit in their county until a constitution or fundamental law was framed which the courts should

apply directly as a test of legislation and legal government, thus reducing to practice the philosophical arguments of Otis and establishing the American common law doctrine of supremacy of law, not as a matter of abstract reasoning, but as a practical condition precedent to the administration of the government, twenty-seven years before John Marshall wrote his opinion in *Marbury vs. Madison* in 1803. Furthermore, this action was based on clearly expressed reasons which contain the basic ideas of Marshall's famous opinion.

The sentences of Thomas Allen quoted above show conclusively that he and his associates were not considering the matter in the light of judicial right or judicial power, but in the light of judicial duty. We must remember the sentence of Otis, "The end of government being the good of mankind points out its great duties." It is only in the light of judicial duty that this subject can be clearly discussed and understood.

#### JOHN ADAMS.

John Adams had, and still has, so vast an influence on American history and government that it is impossible to give an adequate idea of him and his work in this account. I do not class him with Washington. No one but Lincoln belongs in that class. It is futile to compare him with Madison or Hamilton, his great enemy, or with Marshall or others of their generation for they had different functions, and, moreover, they all came after his best work so that he was their teacher in many ways.

Vain, irritable and irritating, particularly during his presidency of the United States, ambitious and at time apparently jealous even of Washington, he yet combined with these peculiarities an intellectual capacity, a range of vision, a spirit of tolerance, in other words, a balance of character and intellect which made men turn to him for guidance in his early 40's. He was not then, nor, indeed, at any time in calm moods, an extremist in any direction. This enabled him to reflect in his draftsmanship most of the permanent sentiments of his fellow citizens in such a way as to satisfy succeeding generations and in many ways to convince the men who framed and ratified the Constitution of the United States for it was he to whom the committee of thirty, appointed to draft a constitution for the Massachusetts Convention, delegated that task in 1779.

He succeeded Otis as the constructive thinker of the Revolution. In his later years as the second President of the

United States, in which capacity he is most generally known, Adams performed the greatest single act of civil service in the history of the country in the appointment of John Marshall as chief justice in the closing days of his repudiated administration. That was his greatest act as President.

As he was one of the most voluminous writers in American history one who wrote much about himself in his diaries and letters and a man who experienced many moods in the course of his long life, his enemies and critics have been able to find ample material for abusing him in one way or another, but the time to take the measure of John Adams is between 1770-1780, when he was full of the fresh enthusiasm of his intellectual responsibilities as a growing leader and before his vision had been darkened by the excesses of the French Revolution and by the threatened anarchy in Massachusetts and elsewhere which accompanied the period of readjustment after the war. It was during this formative period that he justified the statement of his grandson that he was "Eminently qualified to stand forth the exponent of a clear, strong and noble plan of action in time of danger." His strong sense of justice at this time is shown by his undertaking the defense of the British soldiers charged with murder after the "Boston Massacre," when he faced social and political abuse to secure a fair trial.

At the end of an interesting study of the services and relative place of John Adams entitled "John Adams, the Statesman of the American Revolution," delivered in 1884, by the late Mellen Chamberlain, the former Librarian of the Boston Public Library, after discussing the causes and development of the Revolution, Mr. Chamberlain gives the following estimate of the work of Adams:

"I see no one who could have filled his place between 1774 and 1777. \* \* \* Doubtless there is a tendency to over-estimation when our eyes are fixed somewhat exclusively upon a single actor in a cause which enlists the abilities of other eminent men. \* \* \* He did not bring to the Revolution so large an understanding as Franklin. But Franklin lacked some things essential to the cause which John Adams possessed. He lacked youth. \* \* \* But, save Franklin, no man in the colonies was so largely endowed as John Adams. His understanding was extraordinary. He planned well, and he executed his plans. There was no other man of so much weight in action as he. There were wise men—some, estimated by conventional standards, much wiser than John Adams; but none whose judgments on revolutionary affairs have proved

more solid and enduring. There were younger men of genius and older men of greater experience in affairs; but John Adams was just at that period of life when genius becomes chastened by experience without being overpowered by adversity. \* \* \*

"While living John Adams had no stronghold on the people, and at one time, as he said, an immense unpopularity \* \* \* fell upon him; and now that he is dead, even the remembrance of his great services seems to be growing indistinct. He probably lacked many of those qualities which attract popular favor, and those which he possessed, such as courage and steadfastness, were exhibited on no theatre of public action, but in the secret sessions of the Continental Congress. Passionate eloquence on great themes touches the heart to finer issues; but no syllable of those powerful utterances which, as Jefferson tells us, took men off their feet, was heard beyond the walls of Independence Hall; and even the glory of the transaction which made the old hall immortal rests upon the hand which wrote, not upon that which achieved, the Great Declaration. This ought not to be altogether so. It matters little to the stout old patriot with what measure of fame he descends to remote age, for he will never wholly die; but to us and to those who come after us it is of more than passing consequence that we and they withhold no tribute of just praise from those unpopular men who deserve the respectful remembrance of their countrymen."

What was in the background of his mind?

"All Nature's difference keeps all Nature's peace." This quotation from the Fourth Epistle of Pope's "Essay on Man" appears on the title page of Adams' "Defense of the Constitutions of Government of the United States of America \* \* \*." Although this defense was written in London in 1787, just before the Federal Constitutional Convention met, the line quoted from Pope is worth bearing in mind in studying Adams' work up to 1780, for his idea of governmental institutions was based on a profound recognition of the conflicting differences in human nature. This is obviously behind his strong belief in a legislature of two houses, the establishment of which, if I am not mistaken, is to a large extent due to his influence. It was obviously behind the principle of the separation of powers also.

In January, 1776, George Wythe, one of the leaders in Virginia, asked Adams for advice as to the method of accomplishing the transition to a commonwealth government, and a paper



entitled "Thoughts on Government" was then written and sent to Wythe, Patrick Henry, Richard Henry Lee and others, both in Virginia and elsewhere. In this paper appear the following passages (see Adams' Works, Vol. 4, pp. 188-109) :

"Pope flattered tyrants too much when he said :

" 'For forms of government let fools contest,  
That which is best administered is best.' "

"Nothing can be more fallacious than this. But poets read history to collect flowers, not fruits; they attend to fanciful images, not the effects of social institutions. \* \* \*

"Fear is the foundation of most governments; but Americans will not be likely to approve of any political institution which is founded on it. \* \* \*

"The foundation of every government is some principle or passion in the minds of the people. The noblest principles and most generous affections in our nature, then, have the fairest chance to support the noblest and most generous models of government."

It was natural, therefore, that he should draft the twenty-ninth article of the Massachusetts Bill of Rights, which reads :

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but, for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws."

By this famous provision for judicial tenure during good behavior (based on the history of the English bench and the Act of Settlement of 1700) and by the provision elsewhere for an appointive judiciary, the Massachusetts bench has been kept open to all men of capacity whether they were available for election or not. These provisions have stood for 140 years in Massachusetts, and stand today, as the background of the Federal courts. By these provisions and by the later appointment of John Marshall as Chief Justice, John Adams set and explained a standard for the American bench and bar the present influence of which is incalculable.

In saying this, I do not wish to be understood as indulging in any illusions as to the perfection of any system of selection ;

nor in any foolish state pride, or lack of appreciation of the high character and achievement of many of our elected judges throughout the country.

In discussing the subject, the amount of emphasis of one kind or another is often somewhat exaggerated. In a state like Maryland, with a great history, high professional tradition and a strong and influential bar, any system would doubtless produce a strong bench. But an elective system of selection, while it may produce many good judges (as it undoubtedly does if the bar takes an active interest in the matter), nevertheless is likely to close the bench to those men, who, although they are peculiarly fitted for judicial work, are either unwilling to become candidates under an elective system, or, if they should be willing, lack those things which might appeal to voters in an election and whose distaste for a personal controversy for such a position would still further reduce their ability as candidates. Such men should not be excluded from consideration. One practical reason behind the Massachusetts principle of selection, therefore, is that the people should keep open for themselves the opportunity to get the benefit and take advantage of the best judicial capacity wherever or whenever they may find it, whether that capacity is in a man well enough known or "available" to be elected to anything or not.

In speaking in this way, I am not speaking merely in general terms, but I am speaking out of the practical experience of Massachusetts, for the existence of the appointive method of selection for permanent tenure made possible the appearance of Theophilus Parsons, Lemuel Shaw and many others on the Massachusetts bench who would never have appeared there under an elective system with limited tenure; and thus inspired the great speech of Rufus Choate on "Judicial Tenure" in the Convention of 1853, which, as Joseph H. Choate said, "went to dignify and ennoble our profession and to enrich and sustain the very marrow of the Commonwealth."

#### THEOPHILUS PARSONS.

Next to John Adams, Theophilus Parsons had the most constructive mind in Massachusetts during the period from 1778 to 1813. He had also an administrative mind and capacity which Adams noticeably lacked. In a lecture delivered about 1830, Judge Story said: "Parsons was a man who belonged not to a generation, but to a century. The class of men of which he was a member is an extremely small one" (IX Law

Reporter, 290). Judge Story further described him as follows:

"He was about five feet ten inches in height, somewhat corpulent, and of heavy appearance. His forehead was high and smooth, he wore a reddish wig (for he was bald at an early age), which was rarely placed upon his head properly. His mind was well adjusted, his wig never. He generally wore a bandanna kerchief about his neck to protect it from cold winds. His eye was clear, sharp, keen and deep set in his head. It looked through and through you."

He was born in the town of Newbury, in Essex County, in 1750, the son of a clergyman. After graduating from Harvard College, he began to study law in what is now Portland, Me.; but, after the town was burned in 1775, he returned to his father's house, where he found Judge Trowbridge, one of the retired Crown judges, who was living in retirement as he was suspected of Toryism, although he was not molested. Chancellor Kent described Trowbridge as "the oracle of the common law in New England." When young Parsons returned, Trowbridge brought to the house his library, which was said to be the best in New England, and devoted himself to teaching Parsons law. Parsons was, therefore, probably the best trained lawyer in Massachusetts. He began practice in Newburyport and at the age of 28 first came to the front in the State as the leading mind in the convention of delegates from several towns in Essex County which met in Ipswich in 1778 and published their objections to the draft constitution of that year which had been drawn by the legislature and submitted to the towns in the State. This document, known as the "Essex Result," furnished the ideas that largely contributed to the defeat of that proposed constitution and led, later, to the calling of the special convention of 1780 to which I have already referred. One of the important parts of the "Essex Result" was an emphatic demand for a bill of rights. After that he rapidly became, and remained until his death, the leader of the bar and one of the leading Federalists in Massachusetts. He seldom went outside of Massachusetts, but I read somewhere the other day a statement of William Pinkney that "he and Theophilus Parsons were the only men in America who had mastered 'Coke on Littleton'."

He was a member of the Convention of 1780 which framed the Constitution, and he appears to have been the controlling mind in the Federal Convention of 1788 which ratified the Federal Constitution and finally overcame the opposition to

ratification which existed when the convention met. Although it was not generally known at the time, it was he who drafted the amendments which were proposed by John Hancock as president of the convention and voted as recommendations to the First Congress. It was the submission and approval of these proposed amendments which secured the ratification in Massachusetts.

The first of these amendments will, I think, be of special interest in the state of Luther Martin. It read as follows:

"First, that it be explicitly declared that all powers not expressly delegated to Congress are reserved to the several States to be by them exercised."

His son, who was himself a distinguished lawyer, in speaking of these proposals, says that—

"Those who were most earnestly anxious" that the "Constitution should be accepted by the States were perhaps the most profoundly convinced that it had great defects. \* \* \* While they were ready to vote for it as it stood, it must not be supposed that my father merely reduced to writing what others desired and he did not desire. On the contrary, no one was more solicitous than he was that some of them—I may name the first one especially—should be added to the Constitution."

Parson's was one of those men who had a positive dislike of notoriety and, although he wrote voluminously and left masses of manuscript almost all of which have been lost, he never published over his own name anything except a mathematical discussion, other than the opinions which he wrote later as Chief Justice. He was one of those men who furnished ideas for others without claiming any credit for them.

From the time of the Federal Convention in 1788 until 1806 he was in active practice as the leader of the bar in the State. During this time all jury trials in Massachusetts were conducted before three judges of the Supreme Judicial Court who had to travel about the State, which then included Maine, by carriage or on horseback to hold the sessions. The judges often charged the jury separately and there was an appeal as of right to a second jury. It was obviously a weak, dilatory system and, at the beginning of the nineteenth century, the legislature tried the experiment of providing for jury trials before a single judge. The bar, as usual, when any marked change in practice is attempted, was generally opposed to the new plan. In 1806, when Chief Justice Dana resigned, two of the judges of the Supreme Court who felt strongly that an entirely new

man was needed to break in the practice communicated their views to Governor Strong and urged that Parsons should be appointed without notice to him, and, that if this was done, he might be persuaded to accept the office of Chief Justice. It appears from a statement of Judge Story that the personal income of Parsons at that time was about \$10,000, which was a considerable sum in those days. The salary of the Chief Justice was about \$1,500. Parsons accepted the appointment and served until his death in 1813. His salary was raised \$2,000, I think, during that time.

With him the modern administration of justice in Massachusetts began. Parsons applied the view of Lord Lyndhurst, who said "it was the business of a judge to make it disagreeable for counsel to talk nonsense." He not only waked up the entire bar and began to despatch business in a manner unheard of in those days, but he turned his court literally into a law school, vigorously enforced the rules of pleading of which he was a master, checked the volubility of counsel and created a tremendous disturbance in the courts in consequence. Going on the bench at the age of 56, with all the instincts of an old war horse at the bar, he naturally had to learn something about being a judge at the same time that he was teaching the bar how to try cases promptly.

I have said that he turned his court into a law school. Rules of pleading and practice have always been annoying and mystifying, not only to clients and other laymen, but to a large proportion of the bar, and it is not uncommon to hear well-known, able and successful lawyers profess not only more or less ignorance, but more or less contempt for a knowledge of pleading and practice. The reason for the lack of knowledge is that they have had to rely upon others in many ways to attend to the details. The reason for the contempt is that the subject happens to bore them and they do not like to appear ill-informed as to important tools of their professional work, so they disparage the tools. All this is very human, for it is human even for men of ability to talk nonsense at times with the air of wisdom.

But in spite of some of the difficulties and some of the excessive technicality in the older systems of pleading, the system of special pleading at common law and its most skillful expositors performed the function, both in England and in this country, of the modern law school; and it was through study with great special pleaders, like Tidd and others, that many of the great English lawyers developed, by having their

wits sharpened and their noses held down to the careful analysis of facts for the purpose of presenting in clear and logical sequence the legal results of the different aspects of a case. Probably few readers of "David Copperfield" realize that the "Mr. Tidd," the author of "Tidd's Practice," referred to by "Uriah Heep," was the man who appears to have trained many great English lawyers of the nineteenth century.

As the English bar was trained by pleading and pleaders so the early Massachusetts bar was trained. But in Massachusetts the man who took the place of Tidd and his contemporaries was the Chief Justice of the Supreme Judicial Court.

The following story illustrates the disturbance which Parsons created at the bar in the matter of pleading:

"There was a libel case before the court. It was one of special interest, and a great array of counsel and witnesses were in attendance. The plaintiff, in his anxiety to make a declaration that would stand criticism, filed thirteen counts. \* \* \* The defendant had filed a still larger number of special pleas. But when the case was opened and the papers read, the Chief Justice simply remarked that all the counts and all the pleas were bad, that a trial would be of no use, and advised the plaintiff to withdraw his suit, and the defendant to take no costs,—which was done."

His son continues:

"Let it not be supposed that in all cases of deficient pleading he was harsh or severe. On the contrary, it was his constant habit to assist the lawyers, especially the young ones, in making their pleas. It was no uncommon thing for him, when on a circuit, to take the papers to his rooms and call the young counsel there, point out the defects in the pleadings, show how they might be amended, and illustrate, as fully as he could, the principles involved."

On one occasion Samuel Dexter, who was at one time in the Cabinet, who was the leader of the bar next to Parsons and engaged in many of the most difficult cases, protested at the conduct of the Chief Justice saying, "Your Honor did not argue your own cases in the way you require us to." "Certainly not," answered Parsons, "but that was the judge's fault, not mine."

I have said that Parsons had to learn something about being a judge. He received a lesson on this subject from the same Mr. Dexter, who after being particularly annoyed by the interruptions in his presentation of a case, paused for a considerable time and then took from his pocket a small volume:

" 'May it please your Honor,' he said, with great solemnity, 'I will read, with your permission, a few passages from the book which I hold in my hand.' 'What book?' said the Chief Justice, taking his pen to make a note of it. 'My Lord Bacon's "Civil and Moral Essays." I read from the fifty-sixth Essay on Judicature. He then read the passage in which Lord Bacon says, 'Patience and gravity of bearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'.'"

The most complete source of information about Parsons is the memoir written in 1857 by his son, already referred to, who was himself a lawyer of distinction, whose account is trustworthy, well-balanced, and does not appear to fall within that class of family biography which some one has described as "filiopietistic." In summing up his father's career on the bench he says:

"I have observed that all the stories that I have heard of his 'putting down' the lawyers and driving along at a pace which it tasked the strongest to keep up with refer to the first year or two of his judgeship. I once possessed a document, addressed to the legislature, giving the most unqualified and emphatic commendation of his course. It was signed by nearly all the leading members of the bar and was sent to him in connection with the question of raising judicial salaries. But he made no use of this paper. I cannot withhold the remark that my father could not have been very oppressive to the bar without some injury to their clients, that is, the people, and our sharp-sighted fathers would have found this out. Nor can I reconcile with any such fact his exceeding popularity as a judge. The existence of it was plenary. It came from all quarters and in all forms. It gradually overrode even the bitterness of party feelings. It is not enough to say that the people liked to see him snub the big lawyers or that a bold, strong man who goes along in his own way with irresistible force and energy generally carries the multitude with him. These and similar things may be said, but I should not be honest if I did not confess my belief that the true ground of my father's general and permanent popularity as a judge was the conviction among the people that his whole object was to do justice, according to law, promptly and effectually and that, on the whole, he obtained this object."

At a time when the popular interest in proceedings in court was greater than it is now because men had more time to spend thinking about them and the courts furnished the dramatic interest now absorbed by the theatre and other forms of entertainment, these words meant much. During the past 10 or 15 years, particularly, I think, since the address of Roscoe Pound to the American Bar Association in 1908 the bar has been waking up to the excessive emphasis on appellate

work and the relative weakness in administration in American courts generally.

Although his judicial career lasted only six years, in that time Parsons made himself the first great administrator of justice in Massachusetts. It is in no sense of disparagement of the other able judges before or after his time that I speak of him as ranking next to his great successor, Lemuel Shaw, whose career of thirty years as Chief Justice from 1830-1860, as an administrator and as an exponent of the common law had a tremendous influence in stabilizing the government of Massachusetts and keeping it as a common law state.

#### WILLIAM CUSHING.

The last man of whom I shall speak was the first Chief Justice of Massachusetts under the Constitution and the first Associate Justice of the Supreme Court of the United States, appointed by Washington, and the only man who ever refused the Chief Justiceship of that great tribunal, although unanimously confirmed by a very contentious Senate. His judicial service, beginning with his appointment as judge of probate of Lincoln County (now part of Maine) in 1760, at the age of twenty-eight, covered a period of fifty years. William Cushing was the only one of the judges of the Massachusetts court appointed under the Crown who was continued in office by the Revolutionists. He served as a member of the Massachusetts Constitutional Convention of 1780 and, as Chief Justice, within a year or two after that, he charged the jury that slavery was abolished in Massachusetts by the first sentence of the Bill of Rights. While this fact has been discussed in connection with the history of slavery in Massachusetts, it has been overlooked in the discussion of the direct application of constitutional principles as law by the courts. In other words, Cushing began at once as a judge to apply the constitutional principles developed by Otis, by Allen, and by John Adams and their associates.

He was vice-president of the convention which ratified the Constitution of the United States in 1788 and actually presided over that body, as John Hancock, the president, was prevented by the gout from so doing until the closing sessions. He appears to have been a quiet, reserved man, universally respected, as shown by his long and varied judicial career.

The fact that this man, who, during the Revolution, charged the grand jury as to "the nullity of acts of parliament," sat with John Marshall in 1803 and joined in the opinion in *Marbury vs. Madison*, is a fact too long overlooked, in the discussion of the duty of courts to apply constitutional principles as law. John Marshall did not invent that doctrine. He merely explained and applied the central idea of the American Revolu-



tion with unanswerable logic, with William Cushing and Samuel Chase and their associates sitting by his side and supporting him.

I have spoken of a few men, whom I have chosen mainly because they were not only thinkers, but they had a power of convincing statement which plays so large a part in a government like ours, whether it be in the drafting of constitutions and statutes or in the application of principles of law. I should like to speak of the local work of other men, of Samuel Adams, Joseph Hawley, of James Bowdoin, of Joseph Story and others, who co-operated with judgment and practical efforts during the same period, and of those who built upon the foundations later, but time will not permit it. Of course, all of these men, of whom I have spoken, had many ideas which had to be modified in consultation with their fellows, and I am not one who believes that all Massachusetts geese are swans. I have simply tried to picture to you, as living forces, some of the men who helped, in forgotten ways, in thinking out the foundations of the government under which we live today, not as a government of abstract theories, but of applied law—of the common law of America. They knew, as we know, that "what is everybody's business is nobody's business," and that constructive thinking by individuals is necessary before collective thought is possible. They faced the facts of greatness and littleness in human nature at close range and helped to bring out the greatness of the American people. The littleness, of course, is always with us. It is the function and the privilege of members of our profession, now as it was then, to think as hard, as high, as broadly and, at the same time, as close to human nature as they did, in the interest of the public and posterity.

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Note:—The fullest account of William Cushing will be found in an article by Hon. Arthur P. Rugg, the present Chief Justice of the Supreme Judicial Court of Massachusetts, in the *Yale Law Journal* for December, 1920, (Vol. 30, p. 128).

In connection with the story of James Otis, it is interesting to read the following extract from Lord Acton's lecture on "The American Revolution." Lord Acton, "a scholar among scholars," was appointed at the age of sixty-one to the Chair of Regius Professor of Modern History at Cambridge, England. His was one of the striking personalities in the intellectual life of the nineteenth century and in the six years of his professorship he made a lasting mark on the standards of historical study and statement. In the lecture referred to, he said:

"Then James Otis spoke, and lifted the question to a different level, in one of the memorable speeches in political history. Assuming, but not admitting, that the . . . . . custom-house officers were acting legally, and within the statute, then, he said, the statute was wrong. Their action might be authorized by parliament; but if so, parliament had exceeded its authority, like Charles with his shipmoney, and James with the dispensing power. There are principles which override precedents."



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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS  
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*Sworn to and subscribed before me this 20th day of March, 1922.*

JOHN M. MAGUIRE,

*Notary Public.*

*(My commission expires February 16, 1928.)*

[SEAL]

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# A LIST OF ONE HUNDRED LEGAL NOVELS<sup>1</sup>

BY JOHN H. WIGMORE

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1. And what, pray, is a 'legal' novel? For there have surely not been many illegal novels. The illegalities in which the great novelists have figured have commonly been not suits for libels committed by them, but gallant struggles (like those of Charles Reade) to protect their copyrights against pirates, or to vindicate themselves (like poor Cooper) against envenomed reviewers.

A 'legal' novel, as here meant, will be simply a novel in which a lawyer, most of all, ought to be interested, because the principles or the profession of the law form a main part of the author's theme.

As for any definition or further subdividing of the 'legal' novel, it is perhaps unprofitable and certainly difficult, being decidedly open to difference of taste and opinion. Nevertheless, for those who care to pick and choose, there may be noted, in the rough, four kinds:

(A) Novels in which some *trial scene* is described—perhaps including a skilful cross-examination;

(B) Novels in which the *typical traits of a lawyer or judge*, or the *ways of professional life*, are portrayed;

(C) Novels in which the methods of law in the *prosecution and punishment of crime* are delineated; and

(D) Novels in which some *point of law*, affecting the rights or the conduct of the personages, *enters into the plot*.

In the following list these sorts are indicated by the letters A, B, C, D. But let it be understood that such an indication is suggestive only; for the class of a particular novel is often a matter for difference of opinion. Moreover, the list will include only those in which one of these circumstances is a more or less prominent feature.

2. But the list need not try to include *all* such works of fiction—good, bad, or indifferent. Where shall the line be drawn? On the one hand, it must not exclude all but the works of the great masters, from Fielding and Dickens to Stevenson and Howells. Yet it may properly be confined to what may be called literature, i. e.,

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1. This article is a corrected reprint of an article originally appearing in this *Review* in April, 1908 (vol. II, p. 574). Notice is hereby given that neither this article nor the list of novels which follow may be reprinted in any other periodical without permission of ILLINOIS LAW REVIEW.

novels in which character is delineated by a writer of whom style may be predicated. A few notable novels, indeed, must be included to which many would not concede these qualities—for example, "Mr. Meeson's Will"; and a few must be excluded, because, though possibly within that definition, they belong to a class whose influence is bad—such as the Raffles stories. It is obvious, too, that the ordinary detective story—even Mr. Julian Hawthorne's and Mrs. Green's—does not fulfill the canons, while Mr. Aldrich's "Still-water Tragedy," Sir Conan Doyle's "Sherlock Holmes," and M. Gaboriau's "Monsieur Lecocq" do cross the line safely.

3. But, after all, what is served by such a list? Does a lawyer go to a novel to learn his law? And would he even recommend the layman to look into works of fiction for forming correct notions of the ways of the law? Do not even the greatest of the 'legal' novels portray rather the shortcomings and abuses of justice? And will not their perusal by the layman tend rather to fix in his mind (perhaps already prejudiced) a picture distorted and untrue? And even in the commonplace legal incidents of novels, are there not examples galore of the most impossible and illegal doings? Does not the judge sometimes, in a novel, dictatorially order the jury to declare a defendant guilty of murder? Or the plaintiff to pay damages when a verdict in a civil case is found for the defendant? Or the sheriff to sell off the debtor's property before action is begun—et alia enormia? In short, why encourage the layman to read a 'legal' novel?

Well, let us repeat, we are not making a list for laymen. We have in mind rather the novel in which the lawyer himself is, or ought to be, most interested. And from this point of view we can think of several reasons why such a list is worth the labor. For it is certain that the lawyer must, like other men, for his pastime and mental ease, abandon himself now and then to the thrall of fiction. He will not read *all* the novels—even all the good ones; he will probably not read many. He must select. Let him, then, select those which will mean something to him as a lawyer, will have a special interest for one of that elect profession with all its traditions, its memories, its secrets of the craft. And thus, since he *must* select, he will want to select those which as a lawyer he cannot afford to ignore.

\* \* \* \*

4. In the first place, there are certain episodes or types of character in professional life whose descriptions by famous novelists have become classical in literature, such as Sergeant Buzfuz and

the action of *Bardell v. Pickwick* in the "Pickwick Papers," the chancery suit in "Bleak House," Effie Dean's trial in "The Heart of Midlothian." With these every lawyer must be acquainted. This is not merely because of his general duty as a cultivated man, but because of his special professional duty to be familiar with *those features of his profession which have been taken up into general thought and literature*. What lawyer can go through life unfamiliar with such classical gifts to the world as the character of Advocate Pleydell in "Guy Mannering," of Attorney Tulkinghorn in "Bleak House," of Magistrate Popinot in "Cesar Birotteau," and "A Commission in Lunacy," of Attorney Godeschal's office in "A Start in Life"? What lawyer can neglect to tread the paths of his professional progenitors' pursuits in "Copperfield" and "Pendennis" and "Redgauntlet" and "The Lesser Bourgeoisie"? Or to be ignorant of the never-fading scenes in "The Scarlet Letter" and "Les Misérables"—the perpetual possession of humanity? Or to know Smith's Leading Cases while unfamiliar with *Pebbles v. Planestones* and *Jarndyce v. Jarndyce*?

And there are many romances, not yet exalted into classical niches, which claim us in every other respect—the thrilling trial scenes in Hale's "Philip Nolan's Friends," in Reade's "Griffith Gaunt," in Harte's "Gabriel Conroy," in Blackmore's "Lorna Doone," in Holland's "Seven-oaks," in Foote's "John Bodewin's Testimony," in Gray's "Silence of Dean Maitland." And shall "Pudd'nhead Wilson" be forgot? Scott and Dickens are of course pre-eminently the lawyer's novelists.<sup>2</sup> But no lawyer can fail to believe that certain others wrote their books especially for him (books not classical, nor marked perhaps by any single undying episodes). We are here thinking of the lawyers' careers in Trollope's "Orley Farm," in Ford's "Peter Stirling" (said to reflect a career like that of ex-President Cleveland), and in Warren's "Ten Thousand a Year" (*the book for lawyers by a lawyer*); the sheriff's life in Alice French's (Octave Thanet) stories, particularly "The Missionary Sheriff"; the lawyers and the law that permeate the books of Mary Murfree ("Charles Craddock," herself the daughter of a lawyer and legal author), of Charles Reade, of Anthony Trollope, of Stanley Weyman. And who cannot want to peruse, woven

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2. This is the best place to note that their legal lore has been once for all collected and entertainingly (as well as learnedly) described by Judge John Marshall Gest of Philadelphia, in his two essays, "The Law and Lawyers of Charles Dickens" and "The Law and Lawyers of Sir Walter Scott," reprinted from the *American Law Register*, vols. 53 and 54 (1905, 1906) with other similar essays in a volume entitled "The Lawyer in Literature" (Boston, 1913).

into romance in Eggleston's "The Graysons," Abraham Lincoln's oft-told manœuvre with the almanac,<sup>3</sup> the tale of a liar exposed, or Jeffreys' brutal trial of Lady Lisle, the friend of the fugitives, in Conan Doyle's "Micah Clarke"?

5. Then, again, there are the *great movements of legal progress* which have been aided or reflected in the novelist's works. It is one thing to know that imprisonment for debt has been abolished; or to con a catalogue of the reforms of the nineteenth century in the "Select Essays in Anglo-American Legal History"; or to read the lives of Eldon, Denman, Brougham, or Field. But it is another, and a necessary thing, to know the spirit of those times—to realize the operation of the old rules now gone—to feel their meaning in human life and to appreciate the bitter conflicts and their lessons for today. This deepest sense of their reality we shall get only in the novels.

Two great figures stand out as leaders—Charles Dickens and Charles Reade. No man can truly apportion the meed of influence between them and the lawyer-legislators—Mackintosh, Romilly, Brougham, Denman, Campbell. But it is certain that the former sunned and watered what the latter sowed and reaped. We must go to "Bleak House" to learn the real meaning of chancery's delays—to "Oliver Twist" to see the actual system of police and petty justice in London—to "Pickwick Papers" to appreciate the technicalities of civil justice. Was jail-reform more aided by Bentham's essays or by Charles Reade's "Never Too Late to Mend"?<sup>4</sup> How soon would the right to imprison sane people in the private lunatic asylums have been abolished if "Hard Cash" had not been written?<sup>5</sup> That great author's life, in fact, was one long knight-errantry again the dragons and giants of the times.

But even when we leave these eminent leaders we find the institutional abuses of contemporary life pictured in novels here and there with a realism which makes them almost appendices to

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3. It is proper here to keep on helping to kill the slander, long ago started, and chiefly given currency in Lamon's *Life*, that Lincoln used a spurious almanac; the slander has been amply refuted by a competent witness, Mr. James L. King, *ex rel*, Judge Bergen, in the *North American Review*, 1898, vol. 166, p. 186; and the evidence is fully collected in Mr. John T. Richards' "Lincoln as a Lawyer" (New York, 1916).

4. Reade himself said that to exaggerate the description of the abuses would be harder than "to write a libel on hell."

We cannot credit "Bleak House" with influencing the first important reforms in chancery, for it was printed at the very moment of enacting them, in 1852. In Mr. Gest's phrase, "Dickens did not kill the chancery snake, but only jumped on it after it was dead." But was it then quite dead?

5. This book's circulation was in its day exceeded only by "Uncle Tom's Cabin."

the law books. Henry Kingsley's "Austin Elliot" is said to have inspired a stringent legislation against duelling. Balzac's "Cesar Birotteau" exposes the misery and chicanery of bankruptcy proceedings. Cooper's "Ways of the Hour" tried trial by jury on its merits. Besant's "Chaplain of the Fleet" makes us wonder how the miseries of the old Fleet debtors' prison could have been allowed to exist as long as they did. No man who has not read Besant's "The Orange Girl" can appreciate the terrible significance of the punishment of the pillory. Cooper's "Satanstoe" and "Chainbearer" (and "The Redskins" belongs also to the series) reflect the system of land-tenure in early New York and that "anti-rent" agitation which was so intense a problem in those days that we wonder it could ever have been forgotten. The system of transporting convicts to Botany Bay has been a favorite theme; in the best of these stories, though not ranked among the classics, are John Boyle O'Reilly's "Moondyne," Rolf Boldrewood's Australian books, and Becke's and Jeffrey's "A First Fleet Family." Can a lawyer know his profession and its past without knowing these things, and the parts that these many legal institutions have played in the life of the community?

Perhaps here belong, too, many novels which depict a special problem or institution of law, not having in mind its abuses or reforms, but full of instruction and reflection for the lawyer, or notable as classics of romance—"Felix Holt," for example, with a plot turning on a base fee in land; "Paul Clifford," with its terrible problem for the judge; "Eugene Aram," an elaborated transcript of a notable English murder trial.

Here, too, are to be noted the interesting pictures of alien systems of justice—Caine's "The Deemster," Erckmann-Chatrian's "Polish Jew" (said to be the foundation of Irving's play, "The Bells"), Franzos' Austrian stories, Jokai's Hungarian stories, Crawford's for Italy, Tolstoi's superb "Resurrection," and, of course, Balzac, Gaboriau, Sue and Dumas for France, and Scott for the ancient modes of trial.

6. And again, there are the *novels which depict history* for us—that is, the scenes in legal annals which general history has made famous. Here, of course, the magic of Scott has done most. The Vehmgericht in "Anne of Geierstein"—the cruel justice of Louis XI in "Quentin Durward"—the ancient trial by battle in "Ivanhoe"

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6. Doubtless these could be traced out in the work of Mr. Ernest A. Baker, "History, in Fiction: a Guide to the Best Historical Romances, Sagas, Novels, and Tales" (1908), which contains brief annotations to the titles.



—and the trial by ordeal in “The Fair Maid of Perth”—are there not many who will never know (nor need to know) more of these things than are chronicled by the great romancer? And the unspeakable Jeffrey. All the serious rehabilitations of modern historians (including Mr. Zane) will not avail to lighten the picture which the novelists have drawn of his trials; for those have supplied one of the favorite topics—at London, in “Peveril of the Peak” and in “Lorna Doone,” and on the circuit of the Bloody Assizes, in Besant’s “For Faith and Freedom” and in Conan Doyle’s “Micah Clarke” (this surely must begin to be placed among our classics; it is not too soon). And in “Kidnapped” Stevenson has given us the very pages from Howell’s State Trials. “Barnaby Rudge,” too, almost echoes the witnesses in Lord Gordon’s trial for the riot, and we may study Lord Mansfield here. Going further afield we live over again the times of the ill-fated Roman Republic in “Rienzi,” and observe the tragic fate of the DeWitts in Dumas’ “Black Tulip.” There is in fact hardly an end to the line of boundary where history and law unite in the pages of the novelist.

And who cannot feel that this lore is meant for him as a lawyer? What man can say that he is a member of our profession and not *want* to be familiar with these things? And so, shall there not be a list of “legal” novels?

7. But there is a higher standpoint yet. For the novel—the true work of fiction—is a *catalogue of life’s characters*. And the lawyer must know human nature. He must deal understandingly with its types, its motives. These he cannot find—all of them—close around him; life is not long enough, the range is not broad enough for him to learn them by personal experience before he needs to use them. For this learning, then, he must go to fiction, which is the gallery of life’s portraits. When Balzac’s great design dawned on him, to form a complete series of characters and motives, he conceived his novels as conveying just such learning. He even enumerated the total number of characters. His task was, he says:\*

“To paint the three or four thousand salient figures of an epoch—for that is about the number of types presented by the generation of which this human comedy is the contemporary and the exponent. This number of figures, of characters, this multitude of portraits, needed frames. Out of this necessarily grew the classification of my work into Scenes. Under these heads I have classed all those studies of manners and morals which form the general history of Society. \* \* \* If the meaning of my work is understood, my readers will see that I

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7. Preface of 1848—“One of the world’s great prefaces,” Brunetière called it.

give to the recurring events of daily life (secret or manifest), and to the actions of individuals, with their hidden springs and motives, as much importance as the historian bestows on the public life of a nation."

In this view the work of the novelist is to provide a museum of human characters, traits and motives—just as we might go to a museum of zoölogy to observe an animal which we desired to understand but had never yet seen alive; this was Balzac's idea:

"There have always been, and always will be, social species, just as there are zoological species. If Buffon achieved a great work when he put together in one book the whole scheme of zoology, is there not a work of the same kind to be done for Society? \* \* \* There are as many different men as there are species in zoology. The differences between a soldier, a workman, a merchant, a sailor, a poet, a beggar, a priest, though more difficult to decipher, are at least as marked as those which separate the wolf, the lion, the ass, the crow, the shark, the seal, the lamb and so on."

And so the lawyer, whose highest problems call for a perfect understanding of human character and a skilful use of this knowledge, must ever expect to seek in fiction as in an encyclopedia, that learning which he cannot hope to compass in his own limited experience of the humans whom chance enables him to observe at close range.

This learning has been sought, possessed, and valued by many great advocates. Perhaps they have seldom openly inculcated its value. But we find at hand one singularly direct exposition of this theme, which must here be quoted:<sup>8</sup>

Read the literature of the lawyers. Read the lives of those great lawyers and judges of England. Read the literature of human nature. The lawyers can gain many points by reading.

To my mind Balzac is the greatest judge of human nature after Shakespeare. I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially "Eugénie Grandet," the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind that if ever there was a miser out of the pages of literature, that was the man, and that Grandet was his literary father-in-law. I studied "Eugénie Grandet" again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man so that at the end of eight years there was not anything left

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8. Address of Mr. Frank J. Loesch, President of the Chicago Bar Association, in the Legal Tactics Series, at Northwestern University Law School, 1905; published in the ILLINOIS LAW REVIEW, 1907, vol. I, pp. 455, 465, entitled, "The Acquisition and Retention of a Clientage."

but his hide. The greatest admirer of the work I did is that man's own lawyer; but he will not give me credit for having any legal acumen. He maintains that I knew all the facts beforehand. Yet the truth of the matter was that I did not; I drew the bill before I had the facts. I merely judged the man's character from what I had read of "Eugénie Grandet." That experience was to me a life lesson.\*

Let me allude also to another case, one that nearly broke me down with the mental and physical strain. I had bought every printed trial I could find on that particular subject. I had a year to prepare for the actual trial of the case. There were very eminent lawyers on the other side. I will not mention names, for the parties are living. But I did not receive from all these books as much light as I did from a certain classical novel, one that characterized exactly the plaintiff's object and put that party in the lime-light. With that aid I was able to follow all the ins and outs of his maneuvers, and finally to win the case. It was a work of fiction that guided me to a right solution of that person's character, and a knowledge of his character that was essential to victory.

Still another lesson I now recall which I learned from reading—a lesson I will never forget. It related to a gentleman by the name of Gil Blas. Gil had various and sundry adventures, and among others he was made secretary to the Archbishop of Toledo. The Archbishop said to him one day: "Gil, I look upon you as a very likely young man, I like your intelligence and acumen. Now I am getting old. I have to preach once a month. Make it your duty to let me know when you see any failing signs in my mental powers. I will trust you as a friend to tell me about it." So Gil noted the character of the sermon the next month. Then he heard the ensuing sermon; and he thought the Archbishop showed signs of age and senility. At the third sermon he was more satisfied of this, and the fourth was shockingly significant. He complimented the Archbishop on the first sermon, and spoke fairly of the second, but of the others he did not. The Archbishop asked, "Now, Gil, what is the truth?" Gil said: "Your eminence, your mental powers are failing rapidly." "Gil," responded the Archbishop, "I find that I am mistaken in your acumen. The treasurer will pay you and you will leave the house." I have never forgotten the moral of that story. Such incidents of literature add to your knowledge.

And so the best literature—drama or poetry, philosophy or fiction—must always be an arsenal for the lawyer. This, to be sure, is a larger matter than our "legal" novels; yet it includes the best of them.

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8. But there is one more thing worth lingering over, before we come to our list itself, and that is the sources of the information and skill of our "legal" novelists. Where did they learn their legal

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9. Mr. W. K. Lowrey, of the Chicago Bar, related to the writer an analogous case, in which he solved the mystery of a fraudulent bankruptcy on calling to mind the bookkeeping methods which figure in Freytag's "Debit and Credit."

lore? How could they find and use the materials for their legal scenes and characters?

This, of course, has varied greatly with the individual methods of work. Yet, on the whole, it is possible to distinguish certain general differences. There are, broadly, three groups. There are the novelists who were themselves lawyers, or were trained for the law. There are also a few who learned much of it by personal experience in litigation of their own. And then there are those—the most part—who prepared for the legal episodes by special research.

To the first belong, of course, in prime rank, Fielding, Scott, Balzac and Dickens. A long life in the law, as barristers and as magistrates, gave to Fielding and to Scott the material of the law as a second nature.<sup>10</sup> Balzac was destined and trained for it; only at the last moment could he evade his family's ambitions to chain him for life to the lawyer's desk. Dickens, as an attorney's clerk and a court reporter, had all the direct experience which a lawyer's life gives, and almost all the training which a lawyer was then expected to have. There are, too, among today's contemporaries, notable like instances—Robert Grant, Anthony Hope Hawkins, Frederic J. Stimson; though it is odd that most of these avoid the legal life in their fiction. Arthur Train, however, with the vantage point of a District Attorney's office, may well be deemed our modern Fielding, now that he has broadened his canvas.

In the second group are pre-eminent Cooper and Reade. During the latter half of their lives, it would seem that not a year passed, for either, without a lawsuit pending; and thus they came to observe the lawyer within his native lair. Reade, indeed, did enter at Lincoln's Inn, and was called to the bar; but it does not appear that he studied or worked or ever held a brief, or did more than eat the perfunctory dinners; and his most intense interest in the law was not shown until after he had himself brought a suit to rescue a young friend from an asylum. His law he must have learned mostly from the controversies of reform which he took up and from his own constant lawsuits and the numerous lawyers retained by him. These latter, indeed, he sampled variously and judged freely and dictatorially. Listen to this passage from a

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10. Scott, of course, like all the great masters, also made special studies for the accuracy of individual incidents, particularly the historical ones. His appendix-notes exhibit many of these instances. Mr. Gest has pointed out numerous additional ones; his comparison of Scott's "Betrothed" and Tennyson's "Enoch Arden" shows how desirable such accuracy may become.

letter:<sup>11</sup> "My successes have been hardly won. In this case I had to dismiss Jessel for incapacity, Ballantine for colloquy with defendant's attorney, Teesdale because of his chief clerk's incapacity, and Rickerd's managing clerk." The client who could dismiss Jessel and Ballantine must indeed have been self-confident in his own legal acumen. But Charles Reade, after all, was himself "the people's lawyer," a never-tiring advocate for humanity. Cooper, too, seems to have engaged in his lawsuits largely as a matter of principle—to defend the rights of authors and the liberty of thought. This famous romancer, much misunderstood and disliked in his own generation (first by our alien kin across seas, and then by his own neighbors and community), found himself from 1837 onwards in almost continuous litigation; and it is noticeable that the majority of his novels with legal episodes and characters date in that period. Himself without legal training, he was by nature (like Charles Reade) an uncompromising fighter for his rights—a striking example of the type of man whom Ihering's "Struggle for Rights" delights to honor. He had usually an unpopular cause, and he was an unpopular man; but he accomplished the remarkable feat, which the greatest of lawyers might envy, of succeeding with judge and jury when he argued his own cause.<sup>12</sup> No such record can probably be found in history. It is no wonder that he was entitled to weave into his novels, with every claim of verisimilitude, whatever he pleased of legal episode and character.

In the third group belong, naturally, most of the novelists who have dealt with phases of the law. Not having the lawyer's profession or a plentiful experience of lawsuits as their source of information, they have been obliged to obtain by special study the sources adapted to their immediate purpose. Many, of course, have failed, for lack of thoroughness; and the successes are due (where traceable) to the persistent resolve of accuracy in research—the directness of touch with the material of life. Charles Reade, to be sure, belongs in this group also, for perhaps no great realist of contemporary life (except Balzac) made so systematic a search for

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11. *Memoirs*, by C. L. and C. Reade (1887), p. 384.

12. "In these trials he was assisted by his nephew, Richard Cooper, who was his regular counsel. But, outside of him, in the civil suits, he had very rarely any help, and in most of them he argued his own cause. Wherever he appeared in person, he seems to have come off uniformly victorious. Nor were his victories won over inferior opponents. . . . The men against whom Cooper was pitted stood in the very front rank of their profession; they were leaders of the bar in the greatest state in the Union." (Lounsbury's *Cooper*, 1883, p. 182). The most remarkable instance was his complete victory in the suit involving the correctness of his account of the Battle of Lake Erie.

materials of life pictures—the objective truth of his character facts. His system of newspaper clippings and scrap-books is well known.<sup>13</sup> His preliminary search of Parliamentary documents and other verified data made him an insuperable opponent in his many controversies over contemporary law and fact. Here is an example of his reply to a sneering reviewer:<sup>14</sup>

“Can any man offer a fairer test of a book’s veracity than I did? I said, in my preface to ‘Hard Cash,’ that the whole thing rested on a mass of *legal evidence*—bluebooks, pamphlets, newspapers, private letters, diaries of alleged lunatics, reports of tried cases. I offered, in print, to show these, at my own house, to any anonymous writer who might care to profit by my labor—the labor of Hercules. \* \* \* How many, do you suppose, accepted this infallible test of mendacity or veracity in my book? Not one!”

But, naturally, the methods differed with the individual. It would be interesting to trace out the methods of the other great delineators of legal episodes. George Eliot’s success, in what must have been purely a tour de force, is well known, and has earned approval from no less than Sir Frederick Pollock, in his history of *The Land Laws*:<sup>15</sup>

“The curious kind of estate created by the conveyance in fee simple of a tenant in tail in possession, without the concurrence of the owners of estates preceding his own, is called a *base fee*. Though uncommon, it is not unknown in practice; and it has been used by George Eliot, in ‘Felix Holt,’ with great effect and with perfect correctness, as part of the machinery of the plot; insomuch that conveyancers reading the novel have been known to comment seriously, as if the thing had happened to one of their own clients, that the parties did not take better advice.”

But it is Robert Louis Stevenson—that beautiful soul of authorship—who has furnished us perhaps the most interesting instance of conscientious and painstaking preparation of the correct scenery of a legal drama to which the author adds the magic spirit of life and action. No one ever read “Kidnapped” and its sequel, “David Balfour,” with a cool thought as to the construction of its plot, or the historic foundation; but the story was in fact woven out of a

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13. “At least one hour a day was expended in making cuttings from newspapers and magazines for his ‘invaluable’ note-book, as he termed them. . . . The dread of missing some good thing caused him to waste at least three hundred hours per annum on scissors-and-paste work; so that eventually, when he came to catalogue and classify all this congeries of information, the headings alone covered twelve pages of printed matter in double columns” (Memoirs, p. 337).

14. Radiana, “A Terrible Temptation,” p. 271 (reply to the Toronto Globe).

15. 2d ed., p. 110.

recorded trial, used for the purpose.<sup>16</sup> Mrs. Stevenson thus tells of its creation:<sup>17</sup>

"I concluded to try and write it myself (i. e., a play called "The Hanging Judge"). As I wanted a trial scene in the Old Bailey, I chose the period of 1700 for my purpose; but being shamefully ignorant of my subject, and my husband confessing to little more knowledge than I possessed, a London bookseller was commissioned to send us everything he could procure bearing on Old Bailey trials. A great package came in response to our order, and very soon we were both absorbed—not so much in the trials as in following the brilliant career of a Mr. Garrow, who appeared as counsel in many of the cases. We sent for more books, and yet more, still intent on Mr. Garrow, whose subtle cross-examination of witnesses, and masterly, if sometimes startling, methods of arriving at the truth, seemed more thrilling to us than any novel. Occasionally other trials than those of the Old Bailey would be included in the package of books we received from London; among these my husband found and read with avidity. 'The Trial of James Stewart in Ancharn in Duror of Appin, for the Murder of Colin Campbell, of Glenure, Esq., Factor for his Majesty on the forfeited estate of Ardshiel.' My husband was always interested in this period of his country's history, and had already the intention of writing a story that should turn on the Appin murder. The tale was to be of a boy, David Balfour, supposed to belong to my husband's own family, who should travel in Scotland as though it were a foreign country, meeting with various adventures and misadventures by the way. From the trial of James Stewart my husband gleaned much valuable material for his novel, the most important being the character of Alan Breck. Aside from having described him as 'smallish in stature,' my husband seems to have taken Alan Breck's personal appearance, even to his clothing, from the book. \* \* \* Some time after the publication of 'Kidnapped' we stopped for a short time in the Appin country, where we were surprised and interested to discover that the feeling concerning the murder of Glenure (the 'Red Fox,' also called 'Colin Ray') was almost as keen as though the tragedy had taken place the day before. For several years my husband received letters of expostulation or commendation from members of the Campbell and Stewart clans."

Even more interesting was Stevenson's legal research into the materials for "Weir of Hermiston,"—that last and unfinished work, of which he wrote once, "Mind you, I expect it to be my masterpiece." Under the name of "The Justice Clerk" (as originally selected), it was to depict the great Hanging Judge, confronted at the last with the stern ordeal of sentencing to death his own son—a situation already in literature in Bulwer's "Paul Clifford." The Lord Justice Clerk was the Scottish name for the head of the crim-

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16. The trial mentioned by Mrs. Stevenson was held in 1752, and may be found in 19 Howell's *State Trials*, pp. 1-262.

17. Preface to "Kidnapped," *Biographical Edition* (Scribner's, 1905).

inal justiciary; and Stevenson took every pains to prepare accurately the law of his case. Sidney Colvin thus reports a part of those efforts:<sup>18</sup>

"In a letter of Stevenson's to Mr. Baxter, of October, 1892, I find him asking for materials in terms which seem to indicate that he knew this (legal problem) quite well: 'I wish Pitcairn's Criminal Trials, quam primum. Also an absolutely correct text of the Scots' judiciary oath. Also, in case Pitcairn does not come down late enough, I wish as full a report as possible of a Scot's murder trial between 1790-1820. Understand, *the fullest possible*. Is there any book which would guide me to the following facts: The Justice-Clerk tries some people capitally on circuit. Certain evidence cropping up, the charge is transferred to the Justice-Clerk's own son. Of course in the next trial the Justice-Clerk is excluded, and the case is called before the Lord Justice-General. Where would this trial have to be? I fear in Edinburgh, which would not suit my view. Could it be again at the circuit town?' The point was referred to a quondam fellow-member with Stevenson of the Edinburgh Speculative Society, Mr. Graham Murray, the present Solicitor-General for Scotland, whose reply was to the effect that there would be no difficulty in making the new trial take place at the circuit town; that it would have to be held there in the spring or autumn, before two Lords of Justiciary; and that the Lord Justice-General would have nothing to do with it, this title being at the date in question only a nominal one held by a layman (which is no longer the case). On this, Stevenson writes: 'Graham Murray's note *re* the venue was highly satisfactory, and did me all the good in the world.'

And so, in the hands of a master, the law of a legal novel may after all be made as true to reality as when the scribe is of the vocation of law.

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9. And now, at last, for our list. As here offered, it is of composite workmanship, and has grown with the accretions of ten years. It began in a manuscript list of some fifty titles, prepared by the present writer in 1898.<sup>19</sup> This was then enlarged to about one hundred titles for publication in *The Brief*,<sup>20</sup> and that list was then reprinted in *The Library Journal*<sup>21</sup> and in *The Athenæum Monthly Bulletin*.<sup>22</sup> To improve it effectively, both in the earlier classics and in the recent fiction, some co-operative effort became necessary. Accordingly, committees of my students were appointed, who kindly

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18. Editorial Note to "Weir of Hermiston," Biographical Edition.

19. Apparently the pioneer list was that of Professor Wambaugh, published in the Iowa University Law Bulletin in 1889. A few titles in that, not found in the present writer's original list, were thankfully appropriated.

20. Vol. II, No. 2, p. 124 (New York, January, 1900).

21. February, 1901.

22. Westfield, Mass., May, 1901.



undertook to examine the works of one hundred selected novelists of standing.

The result of these efforts, together with the suggestions of other readers, was to increase the list by about two hundred and seventy-five titles, making some three hundred and seventy-five in all. This list was published in the *ILLINOIS LAW REVIEW* for April, 1908 (Vol. II, p. 574). That number of the *REVIEW*, and the reprint of the list, has long since been exhausted. To enlarge the list thoroughly, so as to cover the last decade, is impracticable. But a demand exists for a good reading list of standard Legal Novels. Hence the present list of One Hundred Legal Novels, selected from the former list. Two or three over the hundred are put in for good measure.

It must be added that, in making the selection, the pure detective story, however good, has been omitted; the last decade alone has seen this type of fiction multiplied, until now it forms a genre of its own.

#### A LIST OF ONE HUNDRED LEGAL NOVELS

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|--|--|
| <i>Aldrich</i> , Thomas Bailey:                    | <i>Blackmore</i> , R. D.:                    |
| Stillwater Tragedy. (C)                            | Lorna Doone. (A)                             |
| <i>Allen</i> , Grant:                              | <i>Bulwer-Lytton</i> , Edward:               |
| Miss Cayley's Adventures.                          | Eugene Aram. (A,C)                           |
| (A,D)  | Paul Clifford. (A,C)                         |
| de <i>Balsac</i> , Honoré:                         | <i>Burnett</i> , Frances Hodgson:            |
| César Birotteau. (D)                               | DeWilloughby Claim. (D)                      |
| Cousin Pons. (B,D)                                 | <i>Caine</i> , Hall:                         |
| Père Goriot. (D)                                   | Deemster. (C,B)                              |
| Lucien de Rubempré. (A,C)                          | Law and the Lady (A,D)                       |
| Lesser Bourgeoisie. (B,D)                          | <i>Collins</i> , Wilkie:                     |
| Gobseck. (D)                                       | <i>Cooper</i> , James Fenimore:              |
| Colonel Chabert. (B)                               | Ways of the Hour. (A,B,C)                    |
| Commission in Lunacy. (A,B)                        | Redskins. (B,C,D)                            |
| Last Incarnation of Vautrim.                       | Satanstoe. (D)                               |
| (C)  | Chainbearer. (D)                             |
| Start in Life. (B)                                 | <i>Cox</i> , E. M.:                          |
| Marriage Contract. (D)                             | The Achievements of John                     |
| <i>Becke</i> , Louis, and <i>Jeffrey</i> , Walter: | Caruthers. (C)                               |
| First Fleet Family. (C)                            | <i>Craddock</i> , Chas. Egbert ( <i>Mary</i> |
| <i>Besant</i> , Walter:                            | <i>Murfree</i> ):                            |
| St. Katherine's by the Tower.                      | Prophet of the Great Smoky                   |
| (A,B,C)  | Mountain. (C)                                |
| For Faith and Freedom. (A,B)                       | <i>Crockett</i> , Samuel R.:                 |
| Orange Girl. (A,B,C)                               | The Gray Mare. (A,C)                         |
| <i>Besant</i> , Walter, and <i>Rice</i> , Jas.:    | <i>Crawford</i> , Francis Marion:            |
| Chaplain of the Fleet (Prison).                    | Sant'Ilario. (C,D)                           |
| (C,D)  |  |

- Dickens, Charles:**  
 Barnaby Rudge. (C)  
 Bleak House. (A,B)  
 Old Curiosity Shop. (A,B)  
 Oliver Twist. (A,C)  
 Pickwick Papers. (A,B)  
 Tale of Two Cities. (A,B)
- Doyle, Arthur Conan:**  
 Micah Clarke. (A)
- Dumas, Alexandre:**  
 Black Tulip. (C)  
 Count of Monte Cristo.  
 (A,C,D)  
 Marguerite de Valois. (A,C)  
 Twenty Years After, Part II.  
 (A)
- Eggleston, Edward:**  
 Mystery of Metropolisville.  
 (A,B,C)  
 Graysons. (A)
- Eliot, George:**  
 Adam Bede. (A)  
 Felix Holt. (A,B,D)
- Eckman, E., and Chatrian, A.:**  
 Polish Jew. (A)
- Franzos, Karl Emil:**  
 The Chief Justice. (A,B)
- Fielding, Henry:**  
 Jonathan Wild. (C)  
 Tom Jones. (C)
- Fletcher, J. V.:**  
 Middle Temple Murder. (B,D)
- Foote, Mary Hallock:**  
 John Bodewin's Testimony. (A)
- Ford, Paul Leicester:**  
 Honorable Peter Stirling. (B)
- Frederic, Harold:**  
 Damnation of Theron Ware.  
 (B)
- French, Alice (Octave Thanet):**  
 Missionary Sheriff. (C,D)  
 We All. (B,C,D)
- Gaboriau, Emile:**  
 File No. 113. (C)  
 Monsieur Lecocq. (C)
- Goldsmith, Oliver:**  
 Vicar of Wakefield. (C)
- Gould, S. Baring:**  
 Broom Squire. (A,B,D)
- Grant, Charles:**  
 Stories of Naples and the  
 Camorra. (C)
- Grant, Robert:**  
 Law Breakers. (D)  
 Eye for an Eye. (A,B,D)
- Grey (or Gray), Maxwell:**  
 Silence of Dean Maitland.  
 (A,D)
- Haggard, H. Rider:**  
 Mr. Meeson's Will. (A,B,D)
- Hale, Edward Everett:**  
 Philip Nolan's Friends. (A)
- Harte, Francis Bret:**  
 Gabriel Conroy. (A)  
 Heiress of Red Dog. (A,B,D)
- Hawthorne, Nathaniel:**  
 Scarlet Letter. (C)
- Herrick, Robert:**  
 The Common Lot. (A)
- Hill, Frederick Trevor:**  
 Tales Out of Court. (A,B)
- Holland, Josiah Gilbert:**  
 Sevenoaks. (A,D)
- Howells, William Dean:**  
 Modern Instance. (A,D)
- Hugo, Victor:**  
 Les Misérables. (A,C,D)  
 Ninety-three. (C)  
 Man Who Laughed. (C)
- James, George P. R.:**  
 Morley Earnstein. (B,C)
- Kingsley, Henry:**  
 Austin Elliot. (A,D)
- La Ramé, Louise de (Ouida):**  
 Under Two Flags. (A)
- LeSage, Alain R.:**  
 Gil Blas. (C)
- Mitchell, S. Weir:**  
 Constance Trescott. (A,B,C)
- O'Reilly, John Boyle:**  
 Moondyne. (C)
- Page, Thomas Nelson:**  
 Red Rock. (D)
- Parker, Gilbert:**  
 Right of Way. (A)
- Read, Opie:**  
 Tennessee Judge. (B)  
 Jucklins. (A,B)
- Reade, Charles:**  
 Griffith Gaunt. (A)  
 Never Too Late to Mend.  
 (B,C)  
 Hard Cash. (A,B,C)

*Scott, Walter:*

Anne of Geierstein. (A,C)  
Fortunes of Nigel. (C,D)  
Guy Mannering. (A,B,C,D)  
Heart of Midlothian. (A,B,D)  
Fair Maid of Perth. (A)  
Antiquary. (B,D)  
Ivanhoe. (A)  
Peveril of the Peak. (A)  
Quentin Durward. (C,D)  
Redgauntlet. (B,D)  
Rob Roy. (B,C)

*Senkiewicz, Henryk:*

Comedy of Errors. (A)

*Stevenson, Robert Louis:*

Kidnapped; with its sequel,  
David Balfour (B,C)  
Weir of Hermiston. (B)

*Stimson, Frederick J.:*

Residuary Legatee. (D)

*Stockton, Frank R.:*

Late Mrs. Null. (D)

*Thackeray, William Makepeace:*

Pendennis. (B)

*Tolstoi, Leo N.:*

Resurrection. (A,B,C,D)

*Train, Arthur:*

Tutt and Mr. Tutt. (A,B,C,D)

By Advice of Counsel. (A,B,  
C,D)

As It Was in the Beginning.  
(B)

*Trollope, Anthony:*

Orley Farm. (A,B,D)

Mr. Maule's Attempt. (A,B,  
C,D)

Vicar of Bullhampton. (A,C,  
D)

*Twain, Mark (Samuel Clemens):*

Pudd'nhead Wilson. (A)

*Warren, Samuel:*

Ten Thousand a Year. (B)

*Weyman, Stanley:*

Francis Cludde. (A)

My Lady Rotha. (A)

Man in Black. (A)

*Woolson, Constance Fenimore:*

Anne. (A)

*Zangwill, Isaac:*

The Big Bow Mystery. (A,C)

## REMOVAL BY ADDRESS IN MASSACHUSETTS AND THE ACTION OF THE LEGISLATURE ON THE PE- TITION FOR THE REMOVAL OF MR. JUSTICE PIERCE.

Casual conversation with a number of members of the bar, since the filing of the petition before the legislature for the removal of Mr. Justice Pierce, revealed the fact that many lawyers either did not know, or had forgotten, that the Massachusetts Constitution, ever since 1780, after providing in Chapter 3 that "All judicial officers duly appointed, commissioned and sworn shall hold their offices during good behavior, . . . " has contained in the same sentence the following provision: "provided nevertheless, the Governor, with consent of the Council, may remove them upon address of both houses of the legislature." Many lawyers appear to have thought that the proceeding against Mr. Justice Pierce was an impeachment proceeding. It is common for men to refer to Massachusetts judges as holding office "for life". This, of course, is not the fact and never has been the fact in Massachusetts. The tenure has always been "during good behavior". The reason for the insertion of that clause in the commissions of judges, by express direction of the constitution, is explained by the public controversy between General William Brattle and John Adams in 1773 (see Mass. Law Quart., May, 1917, pages 397-398). In addition to the general provision for impeachment of public officers before the Senate, the special process of removal upon address was provided as applicable only to the judiciary.

This machinery for the recall of judges has, therefore, always been a part of the judicial system of Massachusetts. The process differs from impeachment in that it is a purely legislative proceeding in its nature. This fact was made clear in the statement by the committee prior to the opening of the recent proceedings on March 28th, 1922 above referred to as follows:

"It should be borne in mind that this is a Committee regularly appointed through the adoption of a joint order by the General Court for the purpose of conducting a legislative

hearing, and is not to be considered as a trial court exercising or attempting to exercise judicial functions." While following the general course of a judicial hearing the Committee, whenever occasion arose for decision on matters of detail, referred to the legislative character of the hearing and followed out its announced plan of exercising "its discretion as to the admission or rejection of any evidence that may be offered".

From time to time there have been vigorous criticisms directed at the process for removal by address and regrets were recently expressed in the press that the procedure had not been abolished as archaic and cumbersome at the time of the recent constitutional convention. On the other hand, the provision has always withstood the attacks upon it and the manner in which the powers have been exercised by the legislature under it since 1780 has justified its continued existence and the support which Levi Lincoln gave to it in the debate of the constitutional convention of 1820.

Of course, as no reasons are required to be specified either by the legislature or by the executive for a removal by this procedure (which differs in this respect from an impeachment) the machinery offers possibilities of abuse. In Maine, where there is a somewhat similar provision, it appears to have been abused in the case of Judge Woodbury Davis in 1856. In that case, Judge Davis, a recently appointed member of the Supreme Judicial Court of Maine, decided a question of law as to the conflicting rights of claimants to the office of sheriff. The disappointed claimant instead of taking the case to the full bench, got possession of the jail by force. Political feeling ran high. A petition for the removal of Judge Davis was filed with the legislature. Judge Davis had among his counsel Rufus Choate and Henry W. Paine of Massachusetts and the case created much attention. The legislature voted an address and the governor removed the judge accordingly. It was a purely political removal because the majority of the legislature did not like the judge's view of the law and the governor removed him on grounds which, as quoted in the Law Reporter, showed an utter misconception of the relations between the different branches of the government and seemed to show also a mixture of personal pique because the judge had disagreed with the Governor as to his

legal power in attempting to remove the old sheriff and appoint a new one. (See 19 Law Reporter, N. S., pp. 61-77.) The legislature thereupon abolished the position which Judge Davis held. The next year, the political complexion of the legislature changed, the office was recreated, and Judge Davis was reappointed. Nothing more was heard of the matter. (See 19 Law Reporter, N. S. 652.)

The history of the proceeding for removal in Massachusetts may be found in Bulletin No. 36 prepared by the Committee to Compile Information for the recent constitutional convention of 1917; in chapter IX of the Constitutional History of the Supreme Judicial Court in the May number of the "Massachusetts Law Quarterly" for 1917, and in other discussions therein referred to. The nature and purpose of the proceeding was judicially determined by the Supreme Judicial Court of Massachusetts in an opinion by Chief Justice Morton in *Commonwealth v. Harriman*, 134 Mass. the case which followed the removal of Judge Day of the Barnstable Probate Court in 1882.

Briefly, the history of the exercise of this power in Massachusetts shows various removals of justices of the Court of Common Pleas at the end of the eighteenth century, various Justices of the Peace in the nineteenth century, and three cases relating to judges of the higher courts. In 1803 Mr. Justice Bradbury of the Supreme Judicial Court was removed because of incurable illness, his reason for not resigning being that he had no means of support. He died so soon after his removal that the problem of support did not continue. During the period of anti-slavery excitement, Judge Charles G. Loring, who was both Judge of Probate in Suffolk County and United States Commissioner, was removed by Governor Banks upon address of the legislature from his office of Judge of Probate because, in his capacity as United States Commissioner, he enforced the fugitive slave law, which was at that time unpopular in this neighborhood. This was an obvious abuse of the process as his act as commissioner was a simple performance of his duty under the law. The legislature had voted an address in the previous year and Governor Gardiner had refused to make the removal. The next case was that of the removal of Judge Day of the Barnstable Probate Court already referred to in 1882. The celebrated

trial of Judge Prescott, a judge of probate, in the early twenties, was an impeachment before the Senate and not a proceeding for removal by address.

The careful, serious and responsible manner in which the recent joint committee of the legislature attended and conducted the hearings on the petition relating to Mr. Justice Pierce demonstrated the fact that this constitutional process is a reasonable provision which can be, and has been, fairly and reasonably conducted in practice. The practical demonstration of this fact by the conduct of the hearing and the character of the report of the committee is likely to prove of lasting value to the people of Massachusetts in stabilizing public opinion and confidence in the Massachusetts system for the selection and tenure of judges. However much men may sympathize with Judge Pierce in the matter and regret that the proceeding was brought, yet, it is important that the purely public and impersonal aspect of the matter should be realized.

The Joint Committee consisted of Hon. Leonard F. Hardy of Huntington, Hon. Lewis Parkhurst of Winchester, and Hon. Wesley F. Monk of Watertown, on the part of the Senate, and Messrs. Edwin G. Norman of Worcester, Richard B. Coolidge of Medford, James T. Potter of North Adams, Howard B. White of Ayer, Alfred P. Richards of Plymouth, Elijah Adlow of Boston, Owen E. Brennen of Lowell, and Michael J. Fitzgerald of Worcester on the part of the House.

The committee reported unanimously against removal. After the report (Senate 493) was made to the legislature, it was accepted in the Senate without a dissenting voice and without debate. (Senate Journal, May 22, 1922.) In the House there was a debate in which four persons took part. Representative Jordan, one of the petitioners for removal, argued against the acceptance of the committee's report, but stated that in view of his position in the matter as a petitioner he should refrain from voting. The report was supported by Messrs. Norman of Worcester, the House chairman, and Adlow of Boston and Coolidge of Medford, all members of the committee. Mr. Adlow expressed severe criticism of the petitioners; Messrs. Norman and Coolidge, while strongly supporting the findings and recommendation of the committee, expressed their belief in the sincerity of the petitioners in filing and presenting their case. The report of the committee as a

whole made no comments on the motives of the petitioners, but stated that they were "Not Material." (Report, p. 44.) After the debate the committee's report was accepted in the House by a vote of 145 to 1. (House Journal, May 23, 1922.) The marked absence of sensationalism in the presentation of the case naturally, and obviously, assisted the committee, and, through them, the legislature as a whole, in adding a valuable precedent as to the fair and reasonable manner of conducting such an inquiry.

F. W. G.



## THE NEW BILL RELATING TO MASSACHUSETTS COURTS.

Chapter 532 of 1922 makes five important changes in the judicial system:• (1) the provision for removal by the defendant to the Supreme Court of equity cases brought in the Superior Court and involving more than \$4000 is repealed and Section 32 of Chapter 214 of the General Laws is amended by substituting therefor the following section :

“Section 32. The supreme judicial court or a justice thereof may transfer for partial or final disposition in the superior court or in the probate court, respectively, any cause which is within the concurrent jurisdiction of said courts, respectively, and of the supreme judicial court, subject to appeal, exceptions or other proceedings in the nature of an appeal applicable to such case if originally brought in the court to which it is transferred. The supreme judicial court may also direct any cause which is within such concurrent jurisdiction to be transferred to the supreme judicial court in whole or in part for further action or directions, and in case of partial transfer may issue such orders or directions in regard to the part of such cause not so transferred as justice may require.”

This provision is substantially the same as the second bill recommended by the Judicature Commission (see report, page 134),

(2) Two judges are added to the Superior Court, making the total number of that court 30, including the chief justice,

(3) Probate courts are given original concurrent jurisdiction in libels for divorce or for affirming or annulling marriage,

(4) The bill relative to civil appeals in the district courts which was recommended by the Judicature Commission (see report, pages 136-140) is adopted with slight changes. This

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\* These changes, with one exception, take effect October 1, 1922. The exception is the provision for two more judges of the Superior Court, which took effect on its passage and the judges have been appointed.

bill extends the system, which has been in operation in the Municipal Court of the City of Boston since 1912, throughout the state. In addition to this, it provides that the presiding judges of the three appellate districts shall form an administrative committee for the district courts other than the Municipal Court of the City of Boston. The reasons for the recommendation of this bill will be found in the Judicature Commission report, pages 37-40.

For the reasons explained on pages 39-40, the legislature omitted the requirement of a removal bond which defendants are required to give under the Boston act unless excused by the court from so doing. Accordingly, the plan will begin in the district courts without a bond. As suggested in the commission's report, the requirement of a bond can be inserted by the legislature later if there appears in practice to be a need for it in order to avoid abuse of the removal privilege. Another change from the draft of the commission is that the outlying courts of Suffolk County are attached to adjoining appellate districts other than the appellate division of the central Boston court, to which the commission recommended that they should be attached.

This extension of the appellate plan throughout the state has received the support of this association from time to time during the past ten years. In addition to the successful experiment in the Municipal Court of Boston, under the act of 1912, this plan is the result largely of the work of Judge Lummus during his years of service on the district court before his promotion to the superior bench. No effective answer has ever been made to his pamphlet on "The Failure of the Appeal System", which appeared in 1909. The substance of the new law was discussed fully, the reasons for and against it stated, and its purpose and history explained at length, in the report of the Committee on Legislation of the Massachusetts Bar Association for 1914 on pages 27-28.

(5) The new law also extends the jurisdictional limit of all district courts in the Commonwealth to \$3,000, thus providing additional facilities for jury-waived hearings, in cases in which the parties are satisfied to try the case before the district court. This change, also, carries out to some extent a recommendation of the Judicature Commission in their report on pages 40-42. The commission, however, went further and recom-

mended the entire abolition of any jurisdictional limits based on the amount claimed, and provision for the power of removal by the defendant. The reason given by the Commission was that if the defendant had power of removal to the Superior Court both parties were on an equal footing as to their choice of forum and, if they were satisfied to try a case before the district court, whether it involved \$50 or \$500,000 there was no reason why they should be forced by statute into the Superior Court where the costs both to them and to the Commonwealth would be greater.

All these provisions relating to the district courts, after they have had an opportunity to survive the first struggles of a new law, seem likely to break the grip of the term "inferior courts" upon the tribunals that come in contact with more people than any other tribunals, and gradually to give them a standing in the eyes of the community, the bar, and the appointing power as more important and responsible bodies than they have been regarded as hitherto.

In addition to the foregoing provisions and for the purpose of providing relief for the Supreme Judicial Court, following another recommendation of the Judicature Commission (see report, page 122), the legislature transferred the care, custody, and control of the Boston Court House from the shoulders of the Justices of the Supreme Judicial Court to the sheriff of Suffolk County.

F. W. G.

ADDRESS OF CHIEF JUSTICE WALTER PERLEY  
HALL OF THE SUPERIOR COURT BEFORE THE  
BAR OF WORCESTER COUNTY.

On June 15, 1922, the Worcester County Bar Association gave a dinner in honor of the new chief justice of the Superior Court. Thomas H. Sullivan, Esq., president of the Worcester County Bar Association, acted as toastmaster and Chief Justice Rugg of the Supreme Judicial Court, Justices O'Connell and Thayer of the Superior Court, and George S. Taft, Esq., were the speakers in addition to Chief Justice Hall. The new chief justice spoke as follows:

ADDRESS OF CHIEF JUSTICE HALL.

*Mr. President and Gentlemen:*

This is the fifth time in a period of ten years that it has been my privilege and honor to be a guest of the Bar Association of Worcester County. The first occasion was a complimentary banquet to the present Chief Justice of the Supreme Judicial Court, who was appointed to that position in the year 1911. It needs no word of mine to add to the established reputation as a magistrate that he brought to that distinguished position. Since that day his has been a prominent part in the judicial history of this Commonwealth. He has established, by his opinions, important principles of law and practice, and has met great legal issues with distinction and high courage. His reputation is firmly established, not only with the bench and bar, but with the whole people of the Commonwealth. No ill choice was made by the Governor who named him.

I was present when your association extended its compliments to my associate, Justice O'Connell. I have long had the idea that it was more than an oversight that I was not permitted to speak upon that occasion. I want you to realize that I have, not only a strong sense of justice, but an abiding spirit of forgiveness, in permitting him to tell my best story to you tonight.

Another occasion was a dinner given to my late associate, Mr. Justice Ratigan and myself, an occasion at which Senator David I. Walsh, then Governor, was present and made an

address. The early death of Justice Ratigan terminated a career upon the bench that was full of promise, and was a distinct loss to this bar and to his associates. I was also a guest at a complimentary dinner to Judge Thayer.

Of Justice O'Connell and Thayer, I say what you all know to be the fact, that their judicial learning, their continued energy and faithfulness to duty, have made us all proud of the distinction that Worcester bears by their services upon the bench. It will be a continuing pleasure to me to have the services of two such associates, whose all-round equipment makes them capable of serving in all divisions of the court, and rendering important duties in each.

The last of the five occasions is the present one, when I greet you as Chief Justice of the Superior Court. I prefer to make it a less formal ceremony, and ask you to greet me in that old and familiar spirit that existed when I was a practitioner at this bar, and associated familiarly with my brethren of the profession. I like to think of the days, and continue to think of them, when many of us here were in active practice together, and of our pleasant friendly relations, both in court and out. So far as those relations are concerned, they must continue to exist, for it is to the old county of Worcester and its bar that I make my first address in my new position, and it is to them that I first appeal for help and strength. If I should say things to you this evening that any of you may think professional only, I beg you to remember that underneath it all, the old feelings of sympathy, co-operation and affection still exist.

At the dinner given to Mr. Justice Thayer, the present distinguished Chief Justice of the Supreme Judicial Court was present and made an address, and the then Chief Justice of the Superior Court followed him after dinner. It was held at the Hotel Bancroft, and I remember with what affection they were both received, and the applause that greeted their remarks. The Chief Justice of the Supreme Judicial Court still remains in the service, hale, strong and hearty. Increasing years and the cares of office have resulted in the resignation of the former Chief Justice of the Superior Court. I believe no man ever held the affection of the bar of this Commonwealth in fuller measure. Possessing great dignity, a born judge in his character and deportment, he radiated a



WALTER PERLEY HALL.  
Chief Justice of the Superior Court,  
1922 -

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subtle and kindly influence on those about him. This was most manifest in his own lobby, where a closer view disclosed the sentiment that was sensed by the bar, but was there revealed. I had the great opportunity of being intimately associated with him, especially in his later years of service, and I, of all men, know, and wish you to know, of not only the high character, but the broad sympathy, kindliness of heart and affectionate nature of the man himself. If I can secure in even small degree, the sympathetic assistance that went out to him from his colleagues, my office will be lightened of its burdens and my life made happier in my older age.

So retired John Adams Aiken to his beloved town of Greenfield, among his flowers and his trees, the happiest environment of old age after distinguished service.

"As when a hardy cedar, green with age,  
Goes down with a great shout upon the hills,  
And leaves a lonesome place against the sky."

Of my present associates, no words of mine can evidence the kindly feeling they have shown to me since the resignation of the former Chief Justice. I think when I went upon the Court, I knew every member of it, and I think no lawyer has since been appointed to the bench that I did not know when at the bar. With such social relations and kindly spirit, I am convinced that the court as now organized, will always work with a single purpose, each bearing his load, and giving to the Commonwealth all of his service. The kind words you have heard tonight from my colleagues, present evidence, I believe, of the co-operative spirit that exists, and while the subject is one of embarrassment for me to discuss, I believe it reflects in full measure the sentiments of their associates. . . .

After short references to the days of his practice at the bar, Chief Justice Hall continued—

Coming now to practical professional matters, because I appreciate there must be a time limit on after dinner speaking, I wish to have an old fashioned heart-to-heart talk with you about the superior court, and its relations to this bar.

The report of the Judicature Commission, in connection with certain proposals for legislation relative to increased efficiency in the courts, has resulted in the passage of an act, making important changes in the administration of the law on the civil



side of the court. The legislation passed included these important and striking enactments:

The relative original jurisdiction of the supreme judicial and superior courts is left practically unchanged, but after October first the supreme court may make transfer orders with great freedom relative to equity matters pending both in the supreme and the superior court and in the probate court, permitting the supreme judicial court, or a justice thereof, to transfer for partial or final disposition in the superior court, and in some cases in the probate court, respectively, any case which is within the concurrent jurisdiction of these courts, and the supreme judicial court may also direct any cause which is so pending to be transferred into the supreme judicial court, in whole or in part, for further action or direction. This is an important provision with respect to existing practice, and will doubtless result in operation in relieving the supreme judicial court from a substantial part of its equity work, and transferring it to the superior court. I have estimated that the business so transferred will take practically more than one-half of the time of one judge of the superior court at once, and later will make additional calls upon a justice of the superior court, probably amounting in the aggregate to the entire time of one justice.

Another important provision of the bill is the extension of concurrent original jurisdiction in divorce to the probate courts. The present legislation is deemed to be a method of reducing the business of the superior court in divorce matters. In practical operation, it will be found effective in some counties more than in others, but, upon the whole, will doubtless decrease the work of the superior court perhaps by less than one-half of the service of a justice.

Another very important provision of the bill creates appellate divisions for civil business of the district courts, of which there are about seventy in the Commonwealth. These appellate divisions are appointed by the Chief Justice of the Supreme Judicial Court, and are designed in operation to lessen the number of appeal entries in the superior court. It is based in principle upon the Boston Municipal Court Act of 1912, and to some degree will decrease the business of the superior court. I am hopeful that it may be of material assistance.

In addition to these changes the jurisdictional limit of all district courts is raised to \$3000 and two additional justices of the superior court are created.

These various changes will be found in operation to make a small net decrease of the present civil business of the superior court, although the added equity work of this court will, to considerable degree, be increased after October first.

The discussion of this legislation brings me to a matter of extreme importance, and that is the prompt administration of criminal justice in the superior court. Without undertaking to measure by statistics crime committed in each year in the Commonwealth, it is perfectly obvious that one of the most potent remedies for it is to be found in prompt action, with a resulting final disposition of indictments and appeals. The criminal side of the superior court is congested and must remain so until a sufficient number of judges are assigned from its present quota, or new justices created, to bring this department back to normal. The district attorneys of the Commonwealth are co-operating in a splendid manner to decrease this congestion, and additional sessions have already been held or assigned in the larger countries of the Commonwealth. At this moment there are five sessions of the criminal superior court sitting in the Court House in Boston, in lieu of the usual two assigned sessions. An additional session of four weeks is now being held in the county of Essex and an additional session has just been concluded in the county of Middlesex. Worcester County had three additional weeks in May, and the time of the criminal assignment for the May session in Springfield was practically doubled. An additional assignment has been held in the county of Norfolk, and provision has been made for an extended sitting of the present term at Plymouth. The District Attorney of Suffolk is proposing to undertake to dispose of additional business during the early summer and from September on. The District Attorney of Middlesex County is contemplating the same arrangement. This, with the additional assignment in Plymouth, and possibly Dedham, together with an additional allowance for Worcester County at Fitchburg in August, either by continuing the session or holding a double session, will make effective to some degree the "drive"—if I may use a phrase of the street—in relieving the present congestion. Beginning in September or October, time

should be allotted to make this drive so effective that by the first of the incoming year, the criminal business may be decreased to such an extent that it will not stand in the way of increasing and proper demands for additional civil assignments.

In other words, it seems to me the most effective present method of handling the situation is to ask the civil bar to make some sacrifice during the rest of the present year, to the end that criminal business may be normalized, and after that date to have more judges available for civil sessions. This will, of course, be a temporary disarrangement for the civil bar, but in the final analysis will result in a more satisfactory and effective year's work for the superior court.

Looking at the above suggestions in practical operation, the time is speedily arriving, if not presently reached, when counties, like Worcester, should have a continuous session of the superior court with civil jurors. In view of many of the statutory sessions of the court which cannot be changed, this will involve provision for a superior court session with civil jurors in September, and with breaks of one or two weeks so continuing through June.

I am also satisfied that in Worcester County, among others, a single week of jury waived each month is not an economical arrangement, and that for some months in the year, say every other month, if possible, there should be, at least, a two weeks sitting, as it frequently happens that the court is precluded from starting cases which are likely to take more than a single week. This applies especially to involved equity matters and contested divorces. Please bear in mind that other counties have equally important demands, and the situation is a delicate one to be properly handled. Of course, the relief offered by the recent legislation will permit the bringing of divorce cases in the probate court, and as I have said before, on the other hand, will result in increased demands on the justices of the superior court in equity matters.

Now these proposals can only be made effective by a cordial co-operation of the trial bar with the court itself, and this means that the list must be kept strong, and cases tried without loss of time during assignments. It is perfectly obvious to anyone who gives it a moment's attention, that no judge can dispose of cases without the assistance of, at least, two trial

lawyers, because the statute recognizes the right of attorneys to continuances and the right to mark cases not before a day certain. In my own view, assignments do not make for speed, and while accommodating individuals, in large degree result in discommoding a large number of other lawyers who are waiting about to be reached in the course of business. The effective solution is to keep the list strong, as I have said, and have cases ready for trial when reached. I think there has never been found any disposition on the part of the court to hurry the trial of cases, or to speed up trials for the simple purpose of quick dispositions. In other words, counsel are and should be allowed ample and sufficient time to properly and effectively present their issues, but the court ought not to be compelled to wait for the convenience of counsel, whose duty and first duty is to the session and their pending cases.

As a practising lawyer, I fully realize the comity that does and ought to exist between attorneys when occasions arise where cases cannot be tried in their order. These situations, however, are to a large degree based upon convenience rather than necessity, and form in the aggregate an evil that can be easily corrected. I bespeak, on behalf of the superior court, your cordial co-operation and co-ordination in the dispatch of litigation which is one of the essentials in the administration of justice.

This brings me in connection with the discussion of assignments, to another existing condition which it is imperative, in my opinion, to correct, and that is the time consumed before masters and auditors. Additional weeks of sessions without juries and perhaps also raising of the jurisdictional limit of the district courts may, to some degree, correct this, but some cases will of necessity have to be referred. When a rule issues, stringent provisions should be made as to the times of hearing and the time of the coming in of the magistrate's report, and the bar should co-operate to the last degree that there may be prompt determination of the issues submitted to the masters and auditors, so that, if the case is not adjudicated upon their findings, there may be a prompt hearing in court. I repeat, that I have been a practising lawyer, and realize that comity must exist here to some extent, and that between a master or auditor and two counsel there is always a tendency and an inclination to oblige. Too frequently, however, this is done

for the accommodation of the bar, and as a result, the rights of clients are likely to suffer by the delay. Assignments before masters and auditors should have equal standing with assignments in court, and a protective order, if necessary, should be issued to protect counsel when actually engaged before masters and auditors, but the time limit should be enforced, and the hearing should progress so that the litigation may be concluded, and the rights of the parties established. If it is necessary to make this effective in operation, the bar will have no quarrel with me personally, in making the compensation adequate to the services, but references should be treated as court assignments and not as "knitting work" to be taken up from time to time as occasion may permit.

Another suggestion that has been frequently made, and has been received with approval in certain quarters, is to save the duplication of the trial of criminal cases in district and superior courts. I leave this with this statement, that it is possible the matter may be worked out to a satisfactory conclusion at some later day.

The foregoing suggestions—I should like to call them suggestions only—are made solely for the purpose of bringing to your attention matters that may be adjusted, and situations to some degree cured, by a continuing cordial relation of the court and the bar. To my mind, it involves no serious sacrifice, and certainly no radical changes.

To the end that the court may do its share, the executive officers of your bar association should keep in close touch with the court itself, and so far as I am an efficient agent, the mind of the court will be continually open to any views that will aid in the matters that I have mentioned. I fully appreciate the activity of the Worcester County Bar, and especially of its executive officers, which has been proved on more than one occasion where satisfactory results have been obtained. It is, perhaps, fortunate that my relations with the bar of this county are so cordial and personal that the task will be made more easy. The Worcester County Bar has had, not only great leaders, but a fine record in the administration of justice. It is dear to my heart, not only as an officer of the court, but as a member of this association to see it continue.

Now look at the other side of the picture for a moment. The increasing population and valuation of this Commonwealth

are going to make it imperative within a very few years, that great and important changes and large attendant expense will be necessary to house the courts of the Commonwealth. Already proposals are being discussed with respect to the Suffolk County Court House in Boston, which provides accommodation, in rough percentage, for nearly half of the sessions of the superior court. The County Commissioners of Middlesex, with whom I have had conference, are contemplating additions to one of the court houses at East Cambridge, which will involve at least two additional court rooms. Your own Court House is to some degree congested, and it may become necessary to "reclaim" a court room designed as an equity court, and now devoted to other purposes. I bespeak the active co-operation of the court in any proposals of this character. The court should hold itself ready at all times to dispose of as much business locally as possible, and save clients the expense of going to Boston on urgent matters. In fine, it should be at the disposal of the members of the bar, who are themselves officers of the court, when by co-operation business may be dispatched and justice administered.

The so-called "delays of justice" will never, in the popular mind, cease to exist, but they can be minimized and mitigated by demonstrations of efficiency in the courts of the Commonwealth, because back of all judges and all lawyers stands a great litigating public, and back of them all the people themselves, whose confidence we must have, and whose support is essential. This great possibility can be attained by doing our fair share to see to it, that while ideals may never be realized, and delay may still exist, the man who seeks a remedy for his alleged grievance, may be able to find in open courts active attorneys and efficient magistrates.

The suggestions I have made to you are by no means inclusive, but simply form a message for our immediate consideration. Other and equally important questions must from time to time be discussed and determined. The method of drawing jurors, the assignment of the circuits, and things of that character will be reached in due time.

The summer trip of Chief Justice Taft of the Supreme Court of the United States, relative to practices in the English courts, will doubtless result in suggestions later in the year, and at the same time the proposals of the special committee relative to a

modification of the hearsay rule, and other important questions, will be before the public. These reports, and the discussion accompanying them, will doubtless assist us in the conduct of the judicial department of the government, and may result in an improvement in practice. Of these matters a more intelligent discussion can be had at a later time, and may be properly taken up with committees of the court and committees of the bar.

In conclusion, let me for a moment strike a personal note once more, and say, that when difficulties shall come in the administration of the court, when good advice is needed, and where good judgment is to be exercised, I shall feel that I can always come with confidence to you. I am still a Worcester boy, educated in your public schools, a member of your association, and a resident of your county. I still have a christian name, and do not live in a cloister, and I trust I shall continue to bear a personal relation to each one of you which will never be diminished or extinguished by judicial office.

Gentlemen of the Bar: I thank you for this expression of your confidence and good will. It shall be my part to continue to deserve it.

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*Note.*

The portraits of Charles Allen, Seth Ames, Lincoln F. Brigham, Albert Mason and John A. Aiken, who preceded the new chief justice in his office since 1859, when the court was created, will be found in the November issue of this magazine for 1921 (Vol. VII., No. 1).

### FULL BENCH ARGUMENTS.

Every lawyer who had occasion to argue before our Full Court in the term of the Supreme Judicial Court which has just closed commented how obviously overworked the sitting justices were and gossiped of devising some way to better conditions.

Concededly four weeks of listening almost five hours a day to ceaseless talk from lawyers, good, bad and indifferent, in and of itself would be enough to wear down the endurance of a champion strong-man. To men, as the justices of our Full Court, conspicuous in their desire to hear fairly and consider with an open mind all that even the least qualified lawyer at the bar could urge upon them in a hopeless cause, the strain and fag, increasing from day to day, became so apparent until at the end of the sitting that even the most zealous advocate with the firmest conviction in the utter ignorance of the lower court which had decided against him, voluntarily refrained from talking "his full time."

Cases important to the litigants, trivial in the importance of the law point raised, cases far reaching in precedents to be established, cases intricate and technical, cases muddled and distorted by incompetency, cases involving complicated problems without precedents, and cases of the straining of new conditions against the precedent of the past, followed each other, pell-mell, seemingly without end, to claim the court's attention.

As argument followed argument and the lawyers left the courtroom, their task for the time being was done and their fate laid in the laps of the gods. Cases well argued, cases incompetently presented, obvious points overargued, intricate or doubtful questions completely overlooked, fallacies boldly asserted and plausibly maintained, the highest professional skill manhandling technicalities, each and every case presented to the five sitting justices some aspect of a human, social, political, or economic problem. Out of all the welter of contention, the court has not merely the duty of justice between man and man, but the far greater task of the sage to set guide posts to indicate the way along which seems safest and best



that the future should develop. Their decision of today will show to commerce the paths and measures which business tomorrow should follow, to politicians they indicate what is permanent and what is transitory that an enlarged freedom may ever be building on the ashes of the present. With a sure and firm footing on the past, with a true appreciation of present day demands and a sensing of coming developments, a court of final resort must have leisure to think clearly so that its utterances command instant respect and carry conviction to lawyers and laymen alike.

Every lawyer of the Commonwealth has a just pride in the manner in which our Supreme Judicial Court has always discharged its high trust. It is humanly impossible that it should maintain its standards if work is piled upon it in ever-increasing volume. Each day of sitting en banc means not merely that day's work but additional days of prayerful pondering, diligent research and tireless toil to hand down opinion after opinion in prompt answer to the demands of impatient litigants. We all know that our Court is near the breaking point. What is to be done. There has been years of talk and we are perhaps no nearer a solution.

Propositions have been made to increase the number of justices, to abolish nisi prius work,\* to allow the transfer of the trial of some cases to the Superior Court, to establish an intermediate appellate court for the Superior Court as we have for the Municipal Court of the City of Boston. Each of these has much to commend it.

The bar has often indicated that it desires the Supreme Judicial Court shall retain its nisi prius jurisdiction. We must turn to some method to relieve it in its full bench work. I wish to offer a suggestion which, I believe, has some merit.

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\* Since this was written, the Legislature of 1922 has enacted a statute giving the Supreme Judicial Court, or a justice thereof, power to transfer any case to the Superior Court for partial or final disposition subject to the right of appeal. What this will work out is problematical. Many cases have been brought in the Supreme Judicial Court where there was concurrent jurisdiction, and attorneys made a deliberate choice between it and the Superior Court because they felt that a justice of the Supreme Judicial Court was better able to deal with the particular controversy. This is particularly true lately of labor litigation. It is open to debate whether the bar at present will take kindly to any general abdication of nisi prius jurisdiction by the justices of the Supreme Judicial Court. On the other hand, there can be no doubt that the use of this power of transfer will grant a measure of relief and in time the bar may be educated to the idea of making the court a purely appellate tribunal.

First, let us abolish terms of Court for the sittings of the Full Bench. It requires no argument to demonstrate that today when Court sits more or less throughout the year that dividing its sittings artificially into terms serves no useful purpose.

Secondly, the full court should come in and sit for the first two weeks of each month, say for the nine months of the Court year.

Thirdly, in all except extraordinary cases, a full court should consist of three justices. In cases where the three sitting justices fail to be unanimous, a rehearing may be had before all the members of the court.

If the court sits two weeks only at a time, the sitting justices are not apt to become so case weary. The danger of a case-weary court is a menace not only to the public but to the court itself. The moment that a court of final resort loses the inspiration of expounding and expanding the spirit and philosophy of our law, and regards its task as merely one of ending litigation, its doom is written. It is only in unhurried leisure that a court has time to keep the vision splendid as its constant guide. The more ample the opportunities to reconsider and discuss cases from conflicting viewpoints, the greater the chance to produce great decisions which become legal landmarks.

If a court consists only of three justices, no single justice will have more than two weeks' sitting in eight weeks, so that he will have six weeks out of every two months in which to write his opinions. Suppose the court hears an average of six cases a day while sitting, the three sitting justices will divide fifty cases so each judge will have six weeks to write sixteen or seventeen opinions. By limiting the number of opinions that the individual judge will have to consider, it will also give him more time to study those opinions of his associates for which he shares responsibility.

Lawyers, knowing that if their cases are not heard at one sitting they would have a chance again to present them within four weeks, would not be caught in a mad rush to turn out a brief in order to avoid months of delay. This would doubtless improve the presentation of cases to the court, not only in bettering the quality of the brief but in giving the lawyer more time to mature his oral argument.

In the Federal Courts a Circuit Court of Appeals consists of three judges, irrespective of the number of judges in the circuit. Anyone who has practiced before the Circuit Court of Appeals for our circuit—the first—realizes that three sitting judges, alert-minded in an atmosphere that is unhurried, get more assistance from the oral arguments than does our State Court. The judges have time to examine briefs of counsel before the argument opens. They have in mind the outline of the case and the lines of argument. There is an open and free discussion of the cases on the part, both of counsel and bench. Counsel has a chance of seeing how the minds of the judges are working, to meet the difficulties which exist by answering objections or by pointing out distinctions, or by elucidating points, the importance of which has perhaps not been sufficiently emphasized in the briefs. In a way, it is an open consultation of the judges in which counsel participates to help a thorough understanding of the case.

Thus the oral argument is stimulating to counsel who comes into court fully prepared to be put through the paces, and it is helpful to the court which controls and directs the discussion by questions and suggestions away from the obvious, straight to the nub of what the court wants to be enlightened upon. While this procedure demands more from counsel, it lightens the labor of the court. It is a legitimate demand which any appellate tribunal has a right to impose on the bar.

Our Supreme Judicial Court is too long suffering with fools. It allows incompetent lawyers to waste its time arguing points and cases which only ignorance or lack of preparation would have the hardihood to press upon its attention. In its unvaried courtesy and extreme solicitude for the sensitiveness of every member of the bar, the full court too often allows its time to be consumed by arguments which a few pertinent questions would shut off instantly.

In its desire to live up to its tradition that at the close of its last sitting all cases on its docket shall have been heard, the full court, with all the extra labor of the Tufts and Pelletier cases, has this year performed an amount of work that measured merely in quantity is overwhelming. Each year, however, sees a constantly increasing number of cases brought before it, so that even without any extraordinary demands it is apparent that the handling of the full bench work itself is a

pressing problem. The Massachusetts reports represent so much that is the just pride of our Commonwealth that it is the duty of every Massachusetts lawyer to make this problem his own.

LEE M. FRIEDMAN.

Boston, April, 1922.

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*Note.*

As Mr. Friedman's suggestion that the court should sit as a full bench with three judges may raise statutory questions in the minds of the bar, the story of the quorum of the court may help to focus the discussion. Prior to 1859, the statutory quorum of the court sitting as a full bench was three, except in the single matter of removals of district attorneys and other officials under the act of 1856, which required an actual "majority" and, as the court then consisted of six judges, this meant four. Since 1859, the statutory quorum for all full bench sittings has been "a majority," i. e., four (G.L., ch. 211, sec. 2). In 1873 the court was increased to seven judges, its present number. While the statutory quorum is a majority and the court sometimes sits with four, the usual practice has been to sit with five judges. The fact that four judges are needed as a quorum to do business does not mean that four judges must agree in order to decide a case. The usual rule applies that a majority of a quorum decides so far as the legal requirements are concerned, although it has been the common practice in case of a division of the sitting judges to submit the case on briefs under rule to the judges who did not sit. Mr. Friedman's plan for sittings with three judges would require a statutory provision, but it would not seem to involve any change in the present statutory requirement as to the number of judges who can legally decide a case on appeal for that number has been three for more than a century. (See Report of Committee on Legislation Mass. Bar Assoc. for 1913, pp. 12-15, IV. Mass. Bar Rep. 81-83.)

Mr. Friedman reacted on the above note as follows:

"I am taking the privilege of using H. G. Well's method of commenting on my commentator. I had intended to cover that phase of the question, but you have left nothing further to be said.

“There is, however, one other consideration which ought not to be passed over unnoticed. An objection was raised to three justices forming a full court in that some of the western states, where this has been tried, a full court of three justices has refused to follow a decision previously rendered by three of its other members so that in a court of final resort you had two conflicting decisions on the same subject, each by three of its justices. I think there can be no danger of this in the Massachusetts Supreme Judicial Court, where during the last twenty years there is a conspicuous absence of dissent and where the veneration for precedents is still a marked feature of its judicial temperament.”

Such a possible threatened conflict of decision, as is referred to by Mr. Friedman, would seem to be quite easily avoidable by submitting the case to all the justices on briefs or even by reargument, if necessary, before the whole court.

F. W. G.

## JOHN W. HAMMOND.

An extended and formal appreciation of Judge Hammond and an expression of the sentiment of bench and bar in regard to him, will doubtless appear later upon the records of the Supreme Judicial Court. I wish to say here, individually and as Secretary of the Massachusetts Bar Association and editor of this magazine, merely a few words of appreciation of the assistance which Judge Hammond gave as a member of the Publication Committee of the Massachusetts Law Quarterly from the time the magazine was started in 1915, when he and Judge Sheldon and Mr. Nutter agreed to become members of that committee. These three men have formed a background of advice, criticism, and professional support without which the development of the magazine could hardly have been possible. I shall always remember the picture of Judge Hammond with his hands behind his back walking up and down Judge Sheldon's room for an hour or more one day in the winter of 1916 while the purposes, policy, standards, and general plan for the magazine were being discussed.

I think the sentiment of the bar was represented by the cheerful note of the lines to Judge Morton and Judge Hammond presented at their eightieth birthday party at the annual meeting of the Massachusetts Bar Association on December 7, 1917.\*

"And to you, sirs—tonight—  
 'Tis our pleasure and right  
 To deliver what we have long saved—  
 Our respect, our affection, sincere gratitude,  
 Admiration, indeed, for your just attitude—  
 In short—for the way you've behaved.  
 And this present we give, it is true,  
 Is one which we'll keep ourselves, too,  
 As a memory green  
 Of strong men we have seen—  
 Sirs—the State is indebted to you!"

\* (See III Mass. Law Quart., No. 2, December, 1917, where a good portrait will also be found.)

## THE NEW ACT FOR SHORT FORMS OF PROBATE BONDS.

Under the head of "Records" on pages 118, 119 of the report of the Judicature Commission appears the following statement:

"Since the coming of income tax returns, and all the papers that had to be made out during the war, the people have probably developed a healthy dislike for the accumulation of waste papers in public offices. The general public has little conception, however, of the amount of unnecessary papers which are not only filed in court, but are copied in record books and stored at public expense. We believe that a study of this subject could not fail, in the course of time, to result in an enormous saving of time, space, money and clerk hire.

The courts have been too busy to examine the matter thoroughly, and it has been nobody's business. Habit has given an artificial sanctity to much unnecessary verbiage in our records, and it has always been difficult to shorten them in consequence. An important beginning was made in 1912 by chapter 502 of that year, which shortened the forms of deeds by cutting out unnecessary clauses and words which were being copied into the records over and over again and stored at public expense. But the change came only after a discussion which lasted forty years.

We believe that a careful study of the forms and records now in use in various courts would result in eliminating waste words and paper in many directions. The manner in which even new record offices fill up is an obvious warning of the results of the interminable recopying over and over again of unnecessary words in record books."

As a single step in the direction of abbreviation, the commission recommended an act to eliminate the necessity of a probate bond when no sureties were required. The Judiciary Committee of the legislature has taken a much longer step in

### Relative to Bonds in the Probate Court.

“Chapter two hundred and five of the General Laws is hereby amended by inserting after section seven the following new section:— *Section 7A.* The various conditions set forth for the bonds of fiduciaries specified in section one shall be known as statutory conditions for their several purposes and may be incorporated by reference. All bonds upon such conditions given by persons accepting appointments as such fiduciaries shall be, and be interpreted as, payable to the judge or the senior judge of the court making the appointment and his successors for the benefit of persons interested but it shall not be necessary to specify the judge or any other persons as obligees in the bonds. Such bonds shall be jointly and severally binding upon the parties thereto and the heirs, executors and administrators of each of them without so specifying therein. No letter of appointment need be issued to any fiduciary or recorded, but in lieu thereof an attested copy of the decree of appointment with a copy of the statutory condition shall be issued to the appointee. The direction to post or publish notice of appointment, when necessary, may be inserted in or annexed to said decree. The following forms of bonds may be used and shall be known as statutory forms and shall have the same force and effect as the forms of bonds heretofore in use for their respective purposes. They may be altered as circumstances require.

"I accept appointment as executor, administrator, etc., of  
and stand bound in the sum of  
dollars, with and as sureties  
to perform the statutory condition and we said sureties stand  
bound jointly and severally as aforesaid.

Seal.



“STATUTORY FORM OF BOND WITHOUT SURETIES.

“I accept appointment as executor, administrator, etc., of  
and stand bound to perform the statutory  
condition.

Dated

Seal.

“No penal sum need be inserted in a bond without sureties. In addition to other remedies, the obligations of the several bonds provided for in this chapter may be enforced directly by any party interested in his own name by petition in equity in the probate court. The use of the statutory forms above set forth may be substituted for the longer forms heretofore in use and the practice of issuing and recording letters of appointment may be dispensed with.”

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This is the most important step, in the direction of checking the growth of the mountain of waste paper in record offices, that has been taken since the act to shorten the form of deeds in 1912.

Instead of eliminating the necessity of a bond where no sureties were required, the form of bond in any case is reduced to a single sentence, the body of the bond being already set forth in the statute and being incorporated by reference in the same manner as the statutory covenants in the short forms of deeds.

To illustrate the practical working of the bill, in practice a copy of the decree can be printed on one side or at the top of a sheet of paper and a copy of the statutory condition can be printed at the bottom or on the opposite side of the same sheet. This sheet containing the decree and the condition, specifying what the executor, etc., is to do, can be issued to the appointee in place of the present letter of appointment. It would give all the information that is now given by the letter and it would not have to be recorded. The short form of bond would be the thing to be recorded, instead of the two long printed sheets of paper called the bond and the letter which now have to be recorded upon every appointment and which merely repeat the statutory words.

As specified in the statute, the direction to post or publish notice of appointment, when needed, can be inserted and

recorded either in the decree or annexed to it as a supplementary order, instead of being inserted in the letter as it now is. This point will interest conveyancers.

There seems to be no reason why these short forms of bond should not be printed, either at the foot of the page upon which the decree of appointment is printed, or, perhaps, upon the back of the blank forms of petition and decree so as to avoid the filing of an additional sheet of paper.

A provision was suggested to avoid the accumulation of seals by specifying in the statute that the word "seal" or the letters "L. S." *printed* on the bond should be construed as a common seal of all persons who signed the bond unless it was otherwise specified. Such a provision for a printed common seal would be convenient and would cover all except corporations having a corporate seal of their own which would have to be attached anyway. This plan of a printed seal was not adopted by the legislature.

The judges of probate may well consider, however, under their rule-making power, the plan of specifically providing by rule that the word "common" be added to the word "seal" upon the printed short forms of bond with sureties, thus making only one seal necessary when there are several persons signing the bond and discouraging the practice of pasting additional seals and the necessity of noting them in the record. In view of the fact that the probate files are apt to be frequently examined so that a pasted seal upon a bond is in some danger of getting rubbed off, perhaps the plan of providing for a printed seal on this kind of sealed instrument as suggested, may well be considered by the legislature another year.

The following sentence in the last paragraph of the act will gradually simplify procedure:

"In addition to other remedies, the obligations of the several bonds provided for in this chapter may be enforced directly by any party interested in his own name by petition in equity in the probate court."

A few rules of court for the administration of this jurisdiction may be convenient both for the court and for the bar and, perhaps, other forms, particularly those which call for

recording and storing at the public expense could be abbreviated with a considerable saving of expense, records and storage room and without loss of essential substance although legislation may be needed to accomplish effective abbreviation of records. The limit of the storage capacity of the Suffolk Probate Registry has been practically reached already and the county is facing expense for more space in the near future.

F. W. G.

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### “HARD LABOR” AS AN “INFAMOUS PUNISHMENT” UNDER THE FEDERAL CONSTITUTION.

The fifth amendment to the Federal Constitution provides that,

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . .”

The statute of the District of Columbia prescribes the punishment for,

“wilfully neglecting or refusing to provide for the support of minor children, a fine of not more than five hundred dollars or by imprisonment in the work house of the District of Columbia at hard labor for not more than twelve months or by both such fine and imprisonment.”

In the case of *U. S. v. Moreland*, the defendant was proceeded against in the Juvenile Court by information and was convicted by a jury under this statute and sentenced to “hard labor” for six months at the work house. The Supreme Court of the United States on April 17 decided that it was established law that, “Imprisonment with the accompaniment of hard labor is an infamous punishment made so by the accompaniment of hard labor,” and that since the punishment was infamous the crime was infamous and grand jury proceedings were necessary.

The greater part of the majority of the opinion is devoted to an argument as to whether and why the majority are justified in citing and relying upon the case of *Wong Wing v. U. S.*, 163 U. S. 228 as authority for this proposition. Aside

from the argument as to the use of this case as authority, there is little discussion of the substantial question.

Mr. Justice Brandeis filed a strong dissenting opinion in which Chief Justice Taft and Mr. Justice Holmes concurred. Mr. Justice Clarke took no part in the decision of the case. It appears from this dissenting opinion that the hard labor involved in the sentence under the statute was work on an industrial farm called "Occoquan," where land was cultivated and there were various manufacturing and other kinds of useful work performed on an eight-hour day. It also appears that under the statute if a fine was imposed the court might direct it to be paid to the wife or other person in whose care the children were and that in case of a sentence to the work house the superintendent was required to pay toward the support of the children a sum equal to 50c. for each day's hard labor performed by him, and that, either before trial or after conviction, the father might be released upon giving recognizance for the payment of a weekly allowance for the support of the children.

After distinguishing the question requiring decision in the Wong Wing case, Mr. Justice Brandeis discusses briefly the history of punishments and concludes as follows:

"But even if imprisonment at hard labor elsewhere than in a penitentiary had, in the past, been deemed an infamous punishment, it would not follow that confinement, or rather service, at a workhouse like Occoquan, under the conditions now prevailing should be deemed so. As stated in *Ex parte Wilson*, 114 U. S. 417, 427, and in *Mackin v. United States*, 117 U. S. 348, 351: 'What punishment shall be considered as infamous may be affected by the changes of public opinion from one age to another.' Such changes may result from change in conditions in which, or in the purpose for which, a punishment is prescribed. The Constitution contains no reference to hard labor. The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinion prevailing from time to time. And today commitment to Occoquan for a short term for non-support of minor children is certainly not an infamous punishment."

The decision of the majority has attracted attention of a varied character in the press of the country. The "Springfield Republican" in a recent editorial calls attention to the fact that while the press in general at first "did little more than moralize in jocular vein on the derogatory estimate of toil" suggested by the court's reasoning, now the question is being asked how far this decision is likely to reach as a practical matter either in its direct effect or in its persuasive effect on other courts.

The dissenting opinion seems far more convincing than the majority opinion. This suggests that the court got so interested in arguing over the Wong Wing case that the practical issue got outside of the perspective of the majority.

A number of opinions, relating to the constitutional requirement of grand jury proceedings appear to be written from a more or less theoretical point of view that does not get the practical details and operation of the administration of criminal law in clear perspective. This decision seems an illustration of this fact. To decide as a matter of constitutional law that "labor" today, even with the addition of the adjective "hard", which is capable of very variable meaning in practice, is necessarily a badge of "infamy" for convicted persons seems to show a curiously narrow view of the constitutional provision. The only reason for this view seems to be the compulsory character of labor in a prison and the sentimental historical connection between this idea and the feeling against the idea of slavery. But, every sane man knows that labor for prisoners is important for their physical health and certainly for their mental and moral health, and to talk about it as necessarily "infamous" in these days of modern study in criminology, etc., seems strange.

As Mr. Justice Brandeis points out, the Federal Constitution says nothing about "hard labor." It speaks merely of "capital or otherwise infamous crime." Aside from the discussion of the somewhat abusive words "hard labor," the court does not discuss the essential character of the proceeding in which the defendant was convicted. A criminal proceeding for non-support which has become the common, because the only practically effective, method of securing support for deserted wives and children from a husband who is legally bound to provide it, is obviously a semi-civil proceeding which

is a sort of statutory revival of imprisonment for debt in this particular kind of relationship of parental responsibility. It might almost be described as criminal trustee process, or garnishment, for the family. Its main purpose and operation are not to punish, but to procure the support for the family, and it appears in this case as above stated that the statute required the superintendent of the institution to pay the family 50c. a day for the work of the defendant.

This aspect of the law and the sentence under it showing the purpose for which the statute was passed received no discussion and apparently no consideration whatever from the majority of the court. Yet, it shows the essential nature of the proceeding, which is nothing more nor less than the attachment of the body of the defendant as a step toward the specific performance of the obligation to support. The justification for the proceeding on the criminal side of the court lies in the public interest in the performance of this obligation, but this does not alter the substantial purpose of the statute, which differentiates this "crime" from others. The entire failure to consider this aspect of the question so weakens the force of the majority opinion that a reargument seems desirable. Even on the point of authority of the *Wong Wing* case, the majority opinion does not seem to contain any convincing answer to the remarks of Mr. Justice Brandeis in regard to that case. The decision of that case seems clearly sound upon the point to be decided, but it seems equally clear that it does not control the question now under discussion.

As the fifth amendment applies only to the Federal courts and does not control the interpretation of state constitutions, the direct effect of this decision is limited to Federal jurisdictions, and it does not seem likely that it will be followed by state courts.

Certainly the notion that the only effective remedy in non-support cases must be complicated and delayed and the labor of the government and the citizens who serve as grand jurymen subjected to the additional burden of considering such cases must be somewhat startling to those who are interested in the administrative problems of the criminal law, and who are trying to devise reasonable methods for its more prompt and effective administration.

As far as the District of Columbia and other places under

Federal jurisdiction are concerned, if the case is not reconsidered the practical remedy would seem to be for such offences as non-support, etc., to cut the adjective "hard" out of the statute or, perhaps still better, to cut out the entire provision for specifying labor in a sentence and leave the matter of labor in the various institutions to be dealt with under general rules for administration in such places and allow the court to require a man convicted of non-support to "work" without abusing such a proceeding by any statutory adjective. The modern problems of administration in connection with the criminal law are sufficiently difficult without being hampered by statutory words which do not describe the facts, and the omission of such words apparently would avoid the result of the judgment of the majority of the court or, at least, call for a study of the facts before deciding that the work required renders both the punishment and the offence "infamous."

F. W. G.

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*Note.*

The constitutional history of the requirement of a grand jury and the power of the Legislature to classify crimes in Massachusetts were discussed in the August number of this magazine for 1921. The legislative history of a State Prison sentence as an "infamous punishment" in Massachusetts was discussed in the February number for 1922. The masterly discussion of broad constitutional principles by Mr. Justice Matthews in *Hurtado v. California*, 110 U. S., seems to throw out in bold relief the narrow features of the decision of the majority in the Moreland case.

## THE EFFECT OF NOTICE TO THE BUYER OF INTENDED RESALE BY AN UNPAID SELLER.

(Reprinted by permission from the "Harvard Law Review" for May, 1922.)

The right of an unpaid seller having a lien on the goods to resell them is well established in this country.<sup>1</sup> It is generally held that notice of intention to resell is not essential,<sup>2</sup> and the authorities agree that there need not be notice of the time and place of resale.<sup>3</sup> By the prevailing view, the one requisite to the validity of the resale is that it be made at such a time and place and in such a manner as to afford reasonable protection to the interests of the defaulting buyer.<sup>4</sup> If the seller fulfills this requirement, he may recover from the buyer the difference between the resale price and the original contract price.<sup>5</sup>

Although notice to the buyer of intention to resell and of the time, place, and terms of the resale is not essential, such notice or its absence may be relevant on any issue involving the reasonableness of the duration of the buyer's default<sup>6</sup> or the fairness of the resale.<sup>7</sup> A recent decision<sup>8</sup> attributes greater significance to the giving of notice, by holding that the buyer's failure to object before the resale, precludes him

<sup>1</sup> See WILLISTON, SALES, c. 16; BURDICK, SALES, 3 ed., 289; 2 MECHEM, SALES, §§ 1621 *et seq.*

<sup>2</sup> See *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406 (1896); *Van Brocklen v. Smeallic*, 140 N. Y. 70, 75, 35 N. E. 415, 416 (1893). *Cf. Pratt v. Freeman Co.*, 115 Wis. 648, 92 N. W. 368 (1902). *Contra, Dill v. Mumford*, 19 Ind. App. 609, 49 N. E. 861 (1898). See WILLISTON, SALES, § 548; 2 MECHEM, SALES, §§ 1633-1636.

<sup>3</sup> *Woodward v. Tyng*, 123 Md. 98, 91 Atl. 166 (1914). *Cf. Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826 (1917). See WILLISTON, SALES, § 549.

<sup>4</sup> *Clore v. Robinson*, 100 Ky. 402, 38 S. W. 687 (1897). See *Morris v. Wibaux*, 159 Ill. 627; 646, 43 N. E. 837, 842 (1896). *Cf. Ackerman v. Rubens*, 167 N. Y. 405, 60 N. E. 750 (1901). See WILLISTON, SALES, § 547.

<sup>5</sup> *Dustan v. McAndrew*, 44 N. Y. 72 (1870); *Van Brocklen v. Smeallic*, 140 N. Y. 70, 35 N. E. 415 (1893); *Bowden v. Southern, etc. Co.*, 206 S. W. 124 (Tex. Civ. App., 1918). See 2 MECHEM, SALES, § 1643. The seller may keep any profits from the resale. *Bridgford v. Crocker*, 60 N. Y. 627 (1875). See UNIFORM SALES ACT, § 60 (1); WILLISTON, SALES, § 553.

The Uniform Sales Act codifies the law as to the seller's rights thus far stated. See UNIFORM SALES ACT, § 60; MASS. GENL. LAWS, c. 106, § 49.

<sup>6</sup> See UNIFORM SALES ACT, § 60 (3). See *Van Brocklen v. Smeallic*, *supra*, at 75. See WILLISTON, SALES, § 548. As to whether the reasonableness of resale is a question of fact or of law, see *Woodward v. Tyng*, 123 Md. 98, 113, 91 Atl. 166, 167 (1914); *Morris v. Wibaux*, 159 Ill. 627, 645, 43 N. E. 837, 842 (1896).

<sup>7</sup> See WILLISTON, SALES, § 548; 2 SEDGWICK, DAMAGES, 9 ed., § 755.

<sup>8</sup> *Pride v. Marshall*, 131 N. E. 183 (Mass., 1921).



thereafter from asserting, as a defense to an action by the seller, that the resale was not made in the exercise of "reasonable care and judgment."<sup>9</sup>

The question thus presented would seem an important one commercially, but there is a striking absence of authority upon it.<sup>10</sup> *Pride v. Marshall*<sup>11</sup> bids fair to become a leading case. The seller gave four days' notice of the time, place, and terms of resale. The buyer neither consented nor objected thereto. The sale was held, and the seller sued the buyer for the difference between the contract and resale prices. The buyer contended for his defense that the terms of the resale were unreasonable, that it was not reasonably advertised, and that a better price could have been secured in the Middle West than in Boston, the place where the resale was made.

Since the remedy of reselling the buyer's goods is a privilege conferred by the law upon the unpaid seller, that party, to have the benefit thereof, must exercise this privilege reasonably,<sup>12</sup> and must prove that he did so.<sup>13</sup> Logically, the buyer may deny this reasonableness, unless he has estopped himself from so doing. This he can do only by giving the seller reason to believe that he acquiesces in what is being done.<sup>14</sup> On the other hand, the result of *Pride v. Marshall*

<sup>9</sup> See UNIFORM SALES ACT, § 60 (5). See also note 4, *supra*.

<sup>10</sup> The only other expression of opinion which could be found upon the point is a strong dictum contra in *West v. Cunningham*, 9 Port. (Ala.) 104, 108 (1839). *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88 (1906), sometimes cited to the same effect, is distinguishable. In the case of resale by an unpaid pledgee, the Massachusetts court has held that failure to object to the place of resale after notice thereof precludes the pledgor from asserting its unreasonableness. *Guinsburg v. Downs Co.*, 165 Mass. 467, 43 N. E. 195 (1896). This seems to be the only decision so holding, and an unlimited application of its principle may not be desirable. In *Pride v. Marshall*, the court was apparently impressed by the analogy between the cases. As to the similarity in the positions of an unpaid seller and an unpaid pledgee, see *Madison v. Weyl-Zuckerman*, 60 Cal. Dec. 243, 192 Pac. 110 (1920); *Tuthill v. Skidmore*, 124 N. Y. 148, 154, 26 N. E. 348, 349 (1891). In general, the unpaid seller stands in the better position. For example, he may keep any profits from the resale (see note 5, *supra*), and he may at the resale buy in the goods himself. *Ackerman v. Rubens*, *supra*.

<sup>11</sup> See note 8, *supra*.

<sup>12</sup> See UNIFORM SALES ACT, § 60 (5). It is often suggested that the seller acts as the buyer's agent in making the resale. This is not true. It is a power given by the law. See *Moore v. Potter*, 155 N. Y. 481, 487, 50 N. E. 271, 272 (1898). See WILLISTON, SALES, § 553; 2 MECHEM, SALES, § 1629.

<sup>13</sup> *Thayer Lumber Co. v. Naylor*, 100 Miss. 841, 57 So. 227 (1911); *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657 (1880). Cf. *Wisconsin, etc. Lumber Co. v. Buschow Lumber Co.*, 236 S. W. 410 (Mo. App., 1922).

<sup>14</sup> In *Guinsburg v. Downs Co.*, note 10, *supra*, the court said that silence after notice is a waiver of the right to object. "Waiver" is a slippery term; it seems better, if a true estoppel cannot be worked out, to place the decision frankly upon grounds of practicality or commercial convenience. See 2 WILLISTON, CONTRACTS, § 679.

achieves a certainty which may go far to offset logical difficulties in reaching it. It insures that the seller may know just where he stands, and avoids troublesome inquiries into the buyer's state of mind. The effect of notice on the buyer's right to assert unreasonableness must, therefore, be decided with two considerations in mind: (1) the possibility of working out an estoppel; and (2) the commercial need of certainty.

First, as to the terms of resale, the buyer had notice, and if any of them were unreasonable, he must have known it at that time. It works no hardship in such a case to require prompt remonstrance; and to hold *contra* would render the position of the seller less certain than is commercially desirable. He may reasonably consider that the buyer acquiesces to these terms by his silence. It is submitted that the decision is sound in protecting him when he acts accordingly.

The buyer's second objection was to the amount and kind of advertising. He had no notice as to either. This decision requires the buyer to inform himself at his peril, and puts the burden of seeing that the resale is reasonable in this respect squarely upon him. It is not a very great burden, however, for complete information can be had upon inquiry from the seller.<sup>15</sup> Failure to take this simple step may reasonably be interpreted by the latter as a representation of acquiescence in whatever is being done; and when the seller is thus "lulled into security,"<sup>16</sup> and acts accordingly, it is arguable that the buyer is estopped from asserting unreasonableness.<sup>17</sup> The result thus reached seems to accord with the requirements of business convenience.

The third objection, as to the place of resale, presents a still different problem. The buyer had notice of the place, but asserted that he did not know enough collateral facts to

<sup>15</sup> The seller's refusal to tell what advertising is being done would ordinarily foreclose him from asserting either estoppel or commercial need for his own protection, and would be evidence of unreasonableness and bad faith.

<sup>16</sup> See EWART, ESTOPPEL, 40, 133.

<sup>17</sup> A close analogy is found in the case where failure, during the erection of a house, to make inquiry as to the exact property line was held to estop an adjoining owner from asserting that the house extended upon his land. *Greene v. Smith*, 57 Vt. 268 (1884). It has often been held that where a man stands by and knowingly allows his property to be sold, without remonstrance, to one who buys under an erroneous impression of title, he is estopped from later asserting that the seller did not have authority to sell it. *Chapman v. Pingree*, 67 Me. 198, 202 (1877); *Pickard v. Sears*, 6 Ad. & E. 469 (1837). See *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, 228 (1881). See BIGELOW, ESTOPPEL, 6 ed., 603, 648 *et seq.*

judge of its reasonableness.<sup>18</sup> The seller could not be expected to give data as to widespread market conditions, and in many cases would not himself have such knowledge. Inquiry from him would probably be fruitless. It savors of refinement to say that failure to make such an inquiry, predestined to be unavailing, is a representation of complete approval as to the place of resale. On the other hand, the seller has given all the information that he could reasonably be expected to volunteer; and if he acts in good faith, the interests of the mercantile community may demand his protection strongly enough to warrant the resulting curtailment of the buyer's rights. This result is less harsh in view of the fact that, after all, it was the buyer's own default that created the necessity for the resale.

<sup>18</sup> The market in the Middle West was better than that in the East, and the seller, a national organization, was alleged to have known that fact. The buyer, a local dealer, claimed that he himself did not know it. The opinion assumes the contrary, and upon that interpretation the situation is similar to that discussed under the buyer's first objection, *supra*, and the decision upon it is clearly right. It is, furthermore, doubtful if the seller would have been obliged to take the goods to the Middle West to sell them had the buyer requested it. *Cf. Ginn v. Coal Co.*, 143 Mich. 84, 106 N. W. 867 (1906). It is a matter of degree. Had the better market been less distant, reasonable care on the seller's part might have demanded that he seek that market, and failure to do so would be evidence of bad faith. See *Anderson v. Frank*, 45 Mo. App. 482, 487 (1891).

### LOOSE-LEAF GENERAL LAWS.

In the February number on page 46 the suggestion was made that a loose-leaf edition of the General Laws should be arranged for, which could be kept up to date by those members of the bar who wished to have them. Subsequently, the legislature provided for this by Resolve, Chap. 42, as follows:

*Resolved*, that the State Secretary may provide for the sale of the volumes of the General Laws in such form, "loose-leaf", so-called, or otherwise, as may best render said volumes adaptable for insertion therein of the annual laws as enacted, and may sell the same to applicants at a price sufficient to cover the cost. He may arrange for supplying said applicants at a price sufficient to cover the cost with the annual laws as enacted, in a form best adapted to insert in said volumes."

The problem of the most convenient method of binding and keeping up to date such loose-leaf edition is being studied at the State House. A convenient experiment has been tried in one office.

F. W. G.

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The Publication Committee feels that members of the Association may be interested in the following reference to its work in a well known English law journal:

CLIPPING FROM "THE SOLICITORS' JOURNAL" FOR  
JANUARY 21, 1922.

"THE MASSACHUSETTS BAR ASSOCIATION."

"Our readers in this country are no doubt aware that we attempt from time to time to interest them in legal matters affecting the United States, and, apart from the profit to be gained from studying a legal system springing from the same source and in many ways developing on the same lines as our own, we conceive that union of interest and sympathy between the legal professions there and here will have no small in-

fluence in cementing the bond between the English-speaking countries on which the peace and progress of the world so largely depend. Our own share in this result can be but small, and more importance is to be attached to the personal presence of distinguished English lawyers at meetings of the American Bar Association, and on other occasions in America, and to reciprocal intercourse here; but we are glad to see indications from time to time that our attitude is appreciated and that our pages are read not without interest on the other side, and we may take this opportunity of thanking the Secretary of the Massachusetts Bar Association, for sending us a number of the recent issues of the "Massachusetts Law Quarterly" which, among other matter, contain articles of great interest on the history and development of legal procedure in that State; while the issue for May, 1917, contains one of the most interesting studies of early English judges and lawyers which we have met with. It is founded on an address on the 'History of the Independence of the Judiciary,' delivered by the Hon. HAMPTON L. CARSON, President of the Pennsylvania Bar Association, in June, 1914. Hereafter we hope to give some extracts from it, but, in reference to recent discussion in these pages of Lord Chancellor JEFFREYS, we may note that it endorses the favorable view of his ordinary judicial career which is now usually taken, and also reproduces KNELLER's portrait, saying 'It is a very noble, delicate, and refined face that looks out from KNELLER's canvas. There is birth, breeding, distinction in every line'—which shows that the story we told about it was at least *ben trovato*."

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*Note.*

It should be explained, perhaps, that while the chapter on early English judges referred to was based on Mr. Carson's striking address which was extensively quoted, and deserves reading and rereading, the complimentary remarks about Lord Chancellor Jeffreys referred to, are not chargeable to Mr. Carson, but were quoted from Mr. Zane to supplement Mr. Carson's address on the principle of "giving the devil his due from a different angle."

F. W. G.

**THE NEW ACT REQUIRING DISTRICT ATTORNEYS  
TO BE MEMBERS OF THE BAR AND THE ADVIS-  
ORY OPINION OF THE JUSTICES OF THE  
SUPREME JUDICIAL COURT IN REGARD TO IT.**

Chapter 459 of the Acts of 1922 provides as follows:

Section twelve of chapter twelve of the General Laws is hereby amended by inserting after the word "there-in", in the second line, the words:—and a member of the bar of the Commonwealth,—so as to read as follows:—Section 12. There shall be a district attorney for each district set forth in the following section, who shall be a resident therein and a member of the bar of the Commonwealth and shall be elected as provided by section one hundred and fifty-four of chapter fifty-four. He shall serve for four years beginning with the first Wednesday of January after his election and until his successor is qualified. (Approved May 22, 1922.)

It is stated in the press that a referendum petition is being circulated for the purpose of placing the question on the state ballot next fall whether this act shall be approved or not. Prior to the passage of this act, the House of Representatives requested an advisory opinion of the justices of the Supreme Judicial Court on the question of its constitutionality which had been attacked. The opinion is here reprinted for the information of the bar. This opinion adds another chapter to the recent discussions by the court in regard to the relative position and function of district attorneys some of which have been printed in this magazine (see Vol. VI, No. 4, May, 1921, p. 99).

OPINION OF THE JUSTICES (HOUSE DOC. 1661 OF 1922).

*To the Honorable the House of Representatives of the Commonwealth of Massachusetts:*

The justices of the Supreme Judicial Court respectfully submit these answers to the questions in order of April 20, 1922.

In substance the single inquiry presented is whether under the Constitution it is within the power of the General Court to provide by statute that the several district attorneys shall be members of the bar of the Commonwealth.

There is mention of county attorney in Art. 8 of the Amendments to the Constitution, where it is said that he and other officers there named shall not continue to hold such office after being elected a member of the Congress of the United States and accepting that trust. By Art. 19 of the Amendments the legislature is given power to prescribe by general law for the election of district attorneys by the people of the several districts and to determine their terms of office. These are the only references to county or district attorneys in the Constitution or any of its Amendments. In all other respects the Constitution is silent concerning the office, and the general power of the legislature is left without restriction. These two provisions only recognize an office. They do not secure its tenure or define its term. No right in the office is established beyond the control of the legislature. The office itself may be abolished and the powers transferred to others. It is provided in c. 2, § 1, Art. 9 of the Constitution that the governor shall appoint a solicitor general. That office was not filled for the first twenty years after the adoption of the Constitution, and there has been no incumbent of it during the last ninety years. The office of attorney general was abolished by act of the legislature from 1843 to 1849. The office of the district attorney, although recognized by the Constitution, may be regulated, limited, enlarged or terminated according to the demands of public policy subject only to the single constitutional requirement of election by the people of the districts. It follows that the district attorney is not an officer created or provided for in the Constitution. *Opinion of the Justices*, 117 Mass. 603. *Attorney General v. Tufts*, 239 Mass. 458, 478 to 481.

The General Court has full power to make all manner of wholesome and reasonable laws not repugnant to the Constitution, to provide for the naming and settling of all civil officers not provided for in the Constitution, and to set forth the duties, powers and limits of the several officers of the Commonwealth not in any manner contrary to the Constitution, C. 1, § 1, Art. 4. "In the exercise of this power the Legislature has the right to prescribe the qualifications of all officers and servant of the public not provided for in the Constitution." *Opinion of the Justices*, 138 Mass. 601, 603. *Graham v. Roberts*, 200 Mass. 152. *Opinion of the Justices*, 216 Mass. 605.

The General Court, therefore, has the power to fix reasonable qualifications for those who shall hold the office of district attorney. A statute establishing as an essential prerequisite that he shall be a member of the bar of this commonwealth could not be pronounced unreasonable in a constitutional sense. It is difficult to conceive of one capable of performing the duties of a district attorney unless he were a member of the bar. This was recognized in *Commonwealth v. Connecticut River Railroad*, 15 Gray, 447, where it was said at 449, "it was within the authority of the court, in the exercise of its discretionary power, to allow a disinterested counsellor at law to take the place of the district attorney."

There is a considerable body of authority which holds that the use of the word "attorney" in the title of the office carries with it the meaning that the incumbent must be a member of the bar. It has been said that "To be a district attorney, he must be a lawyer. He is not an attorney in fact. He must be an attorney at law. The name of the officer implies it. He is the attorney of the state in a certain *district*, to distinguish him from an attorney *general*." *State v. Russell* 83, Wis. 330, 332-3. *People v. May*, 3 Mich. 598. *Enge v. Cass*, 28 N. Dak. 219. *Danforth v. Egan*, 23 So. Dak. 43. The power of the legislature to establish such a qualification seems to be recognized in other jurisdictions. *Hanson v. Grattan*, 84 Kan. 843, 845-7. *State v. Sanderson*, 280 Mo. 258, 261.

It is provided by Art. 9 of the Bill of Rights that "all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." There is nothing in the true scope and effect of this article which forbids the enactment of the proposed legislation. Where qualifications of voters or officers are fixed by the Constitution, the legislature cannot add to or subtract from them. *Kinneen v. Wells*, 144 Mass. 497. The right of all persons equally to be selected for public employment in instances where the Constitution does not establish the qualifications is subject to reasonable regulation by the legislature as to qualifications. Before the adoption of the Nineteenth Amendment to the United States Constitution conferring upon all citizens the right to vote regardless of sex, it was held permissible to require or to permit the appointment or election of



women to many public offices. *Opinion of the Justices*, 115 Mass. 602; 138 Mass. 601, 603. The legislature, in establishing offices not required by the Constitution, has frequently prescribed that the persons eligible for such offices or some of them shall possess specified qualifications bearing such relation to the duties imposed as to tend to secure the knowledge, experience and character requisite for the satisfactory performance of the duties, provided it is open to any person to secure the required qualifications. *Brown v. Russell*, 166 Mass. 14, 17. *Taft v. Adams*, 3 Gray, 126. *Opinion of the Justices*, 166 Mass. 589.

It is open to any citizen, possessed of sufficient acquirements and qualifications and of good moral character, who conforms to standing laws, to become and to remain a member of the bar of this Commonwealth. G. L. c. 221, §§ 37, 38, 40, 41. All this is in conformity to the Constitution and creates no favored class. *Hewitt v. Charier*, 16 Pick. 353. *Commonwealth v. Houtenbrink*, 235 Mass. 320. *Commonwealth v. Beaulieu*, 213 Mass. 138. *Lawrence v. Board of Registration in Medicine*, 239 Mass. 424.

Since the power to prescribe the qualification specified in the proposed bill is vested in the General Court, such a qualification, if prescribed by law, would stand on the same footing as other provisions of the law regulating elections. The voters would not be at liberty under the law to disregard it. Officers charged with the preparation of ballots and the conduct and the declaration of results of elections would be obliged to conform to it. *Miner v. Olin*, 159 Mass. 487. *Cole v. Tucker*, 164 Mass. 486. The same result would follow if the word "district-attorneys" as used in the Constitution imports membership in the bar of the Commonwealth.

Each question is answered in the affirmative.

Mr. Justice Pierce has not participated in the deliberations of the justices upon these questions and does not join in this opinion and asks to be excused.

ARTHUR P. RUGG.  
HENRY K. BRALEY.  
CHARLES A. DE COURCY.  
JOHN C. CROSBY.  
JAMES B. CARROLL.  
CHARLES F. JENNEY.

## THE CONTRIBUTIONS OF JOHN L. THORNDIKE TO THE MASSACHUSETTS STATUTE BOOK.

The primary purpose of the publication of this magazine is to stimulate the public and professional interest in law and lawyers as living forces. Accordingly, after a few obituary notices were printed in earlier numbers, a definite policy was adopted of omitting obituary notices on the ground that busy men did not want to read often about dead men, as such, in a magazine of this kind. Occasionally, however, there are exceptions to this, as there are to most general rules. John L. Thorndike was such an exception, not merely because of the legacy of his library in trust for the justices of the Supreme Judicial Court, but because of the freely given professional service of the highest order which he rendered to the public and to the profession in connection with legislation during a period of forty or fifty years. Most members of the bar, even of his own generation, do not know how much he has helped them. It has been suggested that the bar generally would be interested in some account of Mr. Thorndike's legislative draftsmanship as a part of the history of some of our statutes relating to practice and procedure.

Accordingly, the following remarks dealing particularly with the details of this part of his work are here printed. These remarks were a part of the proceedings in his memory which took place before Mr. Justice Braley of the Supreme Judicial Court at the Court House in Boston on April 23, 1921. The following biographical facts from the Resolutions, presented and entered upon the records of the court at that time, are printed by way of introduction.

John Larkin Thorndike was born July 27, 1844, and died on October 24, 1920. He was the son of John Hill Thorndike, an architect in Boston. He was educated in the public schools of Boston, entering the Public Latin School in 1856, from whence in 1862 he went to Harvard College, where he graduated in 1866. He then entered the Harvard Law School, graduated there, and in 1868 was admitted to the bar in Suffolk County.

He first occupied an office with Charles E. Stratton, Esq., a classmate, and later became associated with Francis E. Parker,

Esq. After Mr. Parker's death, he practised alone until 1887 when, with his classmate, Moorfield Storey, and Sherman Hoar, he established the firm of Storey, Thorndike & Hoar which, under varying names as its partners changed, continued until his death.

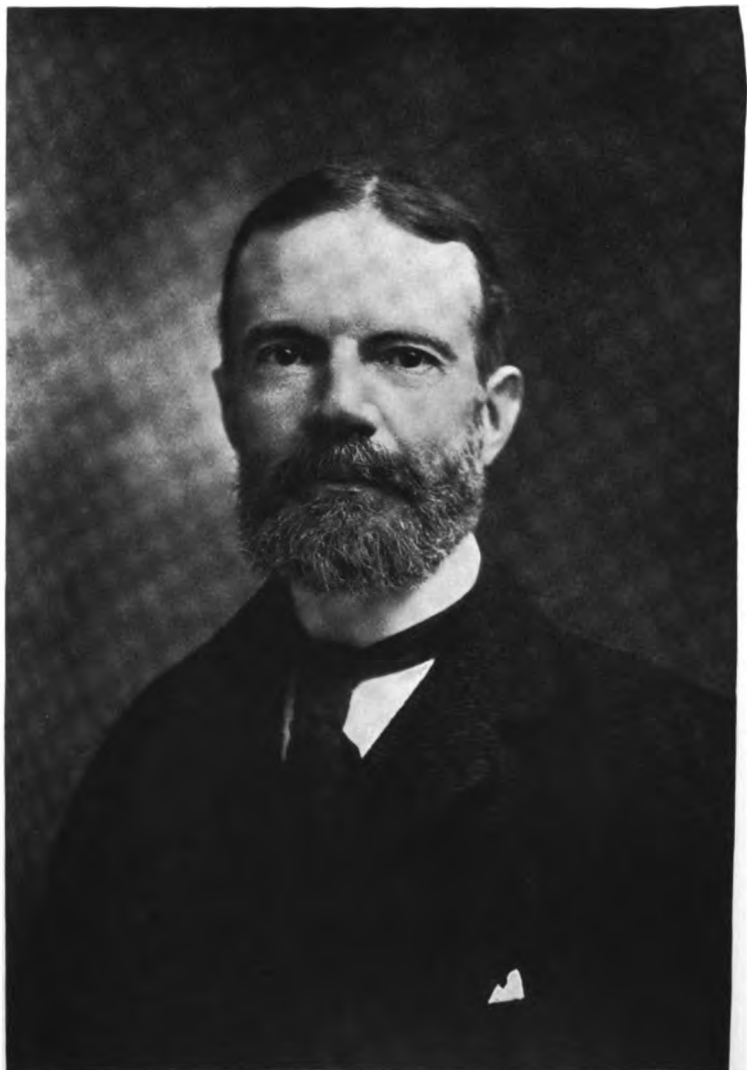
#### EXTRACTS FROM THE RESOLUTIONS.

"While he took good rank in school and college and was recognized as able and intelligent, he showed no especial interest in any one subject until he entered the Law School, when his whole attitude changed. The law interested him deeply, and from the first he drew ahead of his associates. Gifted with a very clear brain and a retentive memory, he devoted himself to study and mastered what he read. His methods were careful and exact, and when he graduated from the school no one of those who were with him there had reaped a greater benefit from its courses than he. . . .

"During these early years he contemplated at one time the preparation of a work on practice, in which one of his classmates, equally without practice, was to collaborate with him, but the plan was abandoned as practice supplanted study. He had a certain number of cases, but he devoted his considerable leisure to reading law and history, keeping up with the reports of Massachusetts, the United States Supreme Court and the English courts, and adopting very early the habit of putting cross-references on the margin of his reports so as to preserve the current of decisions.

"During these years he prepared the digest of selected English cases for the American Law Review during a considerable period, at times prepared the Summary of Current Events for the same magazine and wrote occasional articles. Until he was forty years old his time was largely spent in study, and very intelligent study of the law, the results of which were well arranged in his mind, so that when in 1887 he became a member of the firm with which he was associated for the rest of his life, he was thoroughly equipped for the highest professional work.

"The firm was formed primarily to take the work of the Union Pacific Railroad Company, which was then actively engaged in building branches and extensions, and raising money to pay for them. Upon Thorndike devolved the work



JOHN L. THORNDIKE.



of drawing mortgages, equipment trusts and like instruments, and he did it with such care and skill that his instruments became precedents which were widely followed.

“He devoted himself especially to the law of wills, and no one understood more thoroughly the difficulties and dangers which beset the scrivener, or used language more skilfully and exactly. He became generally recognized as an authority on this subject, and whether in drawing wills himself or in discussing before the court questions arising under wills drawn by others, he showed himself a master.

“He was an authority on questions of municipal law, and his discussions as to the validity of bonds issued by cities, towns or corporations of any kind, his grasp of principles and his judgment were strong and sound. Issues of securities involving many millions of dollars were bought and sold upon opinions which he gave or approved, and though he dealt with these questions for more than a generation, there is no case in which his opinion was overruled by any court.

“He was not fitted for jury trials or public oratory. He was at home in the office or in the argument of purely legal questions before a Court, where he never wasted time on what was immaterial or ornamental. His briefs were models of lucid and concise statement, and content with the citation of a few leading cases, he never overloaded his brief with a mass of less important authorities. He was meticulously exact in the use of words, and his influence was always exerted in favor of brief statement made in correct and discriminating English. He never sought any public position or courted notoriety of any kind. But though the public was not aware of his activity, he was always trying to improve the laws of Massachusetts and to simplify the practice. Before 1874 the dockets of the Supreme and Superior Courts were loaded with cases where there was no defence and in which an answer was interposed by the defendant in order to gain about a year's delay. When the trial list was prepared it often happened that a large majority of the cases were marked to be defaulted when reached. It was a great abuse, and to remedy it Mr. Thorndike, then only four years at the bar, drew the act (St. 1874, c. 248) which provided for separate lists of the cases to be tried by jury and those to be tried by the court, and required the party who desired a jury to claim it. This

act also provided for the affidavit of no defence and the speedy trial of cases where such an affidavit was filed, and further authorized the Court in case of exception or appeal to give the excepting party leave to enter judgment modifying or altering the verdict as the Supreme Court should determine. It was an admirable example of wise remedial legislation, it cleared the docket of uncontested cases, and greatly lessened the work of the courts. The statute which gave the Supreme Court general equity jurisdiction (St. 1877, c. 178, sec. 1) was drawn by him and passed largely as a result of his work. The act which gave concurrent jurisdiction in equity to the Superior Court and regulated the practice therein, which did away with the old-fashioned verbiage that until then encumbered bills in equity, and in many other ways made equity practice easier, appears to have been largely, if not all, his save the first section. The act which made the first Monday of every month a return day and simplified procedure (St. 1885, c. 384), the acts which regulated appeals from Probate Courts and gave them equity jurisdiction, various acts relating to conveyances and the transfer of lands, and many other statutes which made important reforms in the law, embody his work. The St. of 1916, c. 108, abolishing a surviving remnant of the feudal law pertaining to contingent remainders was drawn by him. It shows a mastery of legal language and technicalities.\* . . . It is a model statute remarkable alike for its brevity and clarity. . . . It would be impossible within the limits of this memorial to enumerate all the work of this sort that he did. . . .

"He did this work quietly, at his own expense prepared briefs and memoranda to accompany his proposals to the legislature, and did an enormous amount of unpaid and unrecognized labor for which the public owes him a debt of gratitude. He recognized to the full his duty to the profession and was constantly endeavoring to discharge it.

"His loyalty to the court was shown in many ways, and especially by a bequest to the Supreme Court of his very

\* This act was adopted probably because the legislature had confidence in the judgment of the late Judge Arthur E. Burr, then a member of the House Judiciary Committee, who had charge of the bill. It was natural, as well as entertaining, that the bill with its condensed use of the terms: "executory devise," "springing or shifting use," "perpetuities" and "double possibilities" excited the ridicule of the laymen in the legislature, who regarded it as one of the "freak" bills of the session of 1915.

valuable law library which he had been accumulating during years and which included among others many volumes from the library of Francis E. Parker, Esq., which was left to him by Mr. Parker in his will. The volumes contain his notes and cross-references in many cases, and their value is enhanced by these contributions.

“There is probably no man who has at once his knowledge, his public spirit, his patience and his skill in writing who can fill the place which he has occupied and be of equal service to the public. A high authority in many branches of the law, a counsellor of exceptional ability, thorough education and long experience, a lover of his profession, a just and honorable man, he was an ornament to the bar while he lived, and the unique place which he occupied and which is left vacant by his death can in our time hardly be filled.”

The Resolutions from which the foregoing extracts are taken were prepared by a committee of the Bar Association of the City of Boston, consisting of Messrs. Alfred Hemenway, Moorfield Storey, Edward W. Hutchins, Frederick P. Fish, and Henry A. Wyman. They were presented to the court by Messrs. Hemenway and Storey and were then supplemented by remarks of Mr. Storey and Messrs. William G. Thompson and F. W. Grinnell. Mr. Justice Braley responded on behalf of the court and the proceedings were entered upon the records. As Mr. Grinnell's remarks were devoted largely to the history of the statutes, they are printed here to supplement the account in the Resolutions bearing upon the story of Mr. Thorndike's contributions to the statute books.

Mr. Grinnell spoke as follows:—

“My association with Mr. Thorndike will always remain among the most interesting and entertaining experiences that I have had. I had the opportunity of seeing rather intimately his enthusiastic interest and careful work relating to the machinery for the administration of justice, and I shall speak of him from that angle. Also, as an officer of the Massachusetts Bar Association, I wish to express appreciation of the continuous and generous interest and assistance which he was always ready to give.

“His knowledge and understanding of the technical rules of practice and of their history and meaning was such that it



is no extravagance to believe him capable of meeting the great masters of special pleading at common law on their own ground with an even chance of outpleading them. He told me once that the thing which led him to make so close a study of practice was his appearance before the Supreme Judicial Court in the time of Chief Justice Gray. He noticed the habit of the chief justice when a case was called, of turning over the pages of the record rapidly on the lookout for defects. After observing this and experiencing the results of it on a few occasions, he determined that he would understand the subject as well as the chief justice did. After that, whenever he appeared before him and saw the pages being turned over he said to himself, "I know what you are looking for and you will find it." This sort of interest led him to master Tidd's Practice and Tidd's Forms and other similar books and forms relating to civil practice at law and in equity, in conveyancing, and other fields of draftsmanship.

"He used to say when he heard somebody complain of technicality that it generally meant that the man did not want to take the trouble to do a thing right, therefore, he called it technical by way of abuse. Most of us have indulged in that form of criticism of some point of procedure at one time or another and we also know that Mr. Thorndike's explanation of the reason in many cases is the right one.

"Yet, the rarest quality in the man was not his technical equipment. He did not take it all too seriously. He had that master's grasp of the subject which enabled him to propose, in careful, technical but simple language, simpler and more natural methods of proceeding which retained the substance of the technical ideas, but which made life in practice more convenient for the members of the bar as a whole. It was the balanced character of his knowledge combined with the enthusiasm of an artist in his profession which led him to render a great and continuous public service to the bar of the Commonwealth and, through them, to the people, during a period of over forty years. He did most of this so quietly that many of the bar today are utterly unconscious of the fact that he had anything to do with many of the convenient changes in practice which have occurred during the past fifty years. The information which was given here in the resolution today will probably come to many as a revelation. It is of

professional importance that the story of the work of a man like Mr. Thorndike should be told and should be generally known by the bar, as a practical example of what is meant by a genuine professional spirit in its highest and best sense.

"I first met Mr. Thorndike during the winter of 1911-1912, when I served on a committee\* of the Massachusetts Conveyancers Association in preparing the draft of the so-called Short Form of Deeds Act which was finally adopted as Chapter 502 of 1912. There was nothing new about this movement to shorten the form of deeds. Such suggestions had been made and discussed for at least 40 years and Mr. Thorndike himself had been one of the leaders in bringing up the subject from time to time. The natural conservatism which is supposed to characterize the bar, and particularly the conveying bar, had always prevented agreement upon a satisfactory method of abbreviation. Accordingly, the accumulation of unnecessary words in instruments relating to real estate, resulting from the cautious habits of a century or two, had continued at the expense of the public for clerk hire, and storage room, as well as in other ways. In spite of this fact, Mr. Thorndike had shortened the forms which he himself used for many years before 1912 by eliminating much that was unnecessary.

"Several drafts of this act were presented to the legislature and were discussed, not only line by line, but word by word, among conveyancers during that winter and at meetings of conveyancers' associations as well as with the subcommittee of the legislature. In view of the practical necessity of the utmost abbreviation because of the filling up of record offices, it was the committee's purpose to eliminate every unnecessary word in the preparation of the permissive statutory forms. Mr. Thorndike took great interest in this discussion as he had done whenever it had come up in previous years. He did not like the various drafts and he went to the trouble and expense of preparing and printing for the use of the legislature detailed criticisms and proposed substitutions for the bills or for different parts of them. During the winter I had several conferences with him in regard to the matter and finally there was a meeting of the Committee on the Amend-

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\* The other members of the Committee were Hon. W. T. A. Fitzgerald, Chairman, Edward S. Page, Fred L. Norton, and Henry M. Spelman.

ment of the Law of the Bar Association of the City of Boston in the office of Mr. John C. Gray.

"At that meeting, Mr. Frank Brewster and I submitted the draft which had survived discussion up to that time and the committee gave Mr. Thorndike full opportunity to express his views and feelings in regard to it. While I do not remember exactly what he said, I shall always remember the fact that he dissected the draft without sparing caustic comments either upon its phraseology or upon those who had presumed to draft such a document. As I had some share in the drafting, I came in for a considerable amount of the comment; but he was so interesting and his irony, however keen, was so entertaining, that I would gladly have continued as the butt of the conversation in order to hear him talk.

"After he had expressed himself fully in opposition to the proposed draft, the committee indicated that they approved of the general plan of the draft, and then Mr. Thorndike accepted the situation and promptly proceeded to make specific criticisms and suggestions as to phraseology, a number of which were accepted on the spot and were distinct improvements in the form of the act as it was finally adopted, particularly in the general rules contained in it.

"It was not surprising after this controversy that his feelings in regard to the act as passed should find expression, on the outside of the folder in which his papers relating to it were kept, in the title "Slovenly Deeds Act." He was right. From the point of view of form of an expert draftsman the adverb is justified. The rest of us realized this, but we were faced with a practical problem which would not yield to some of Mr. Thorndike's suggestions.

"A year or two after that I began to come in contact with him in connection with discussions of proposed legislation relating to practice in the courts and I had the opportunity to help him in presenting some of his views and carefully prepared drafts to the legislature.

"We had long conferences in his office often lasting for two or three hours at a time. In the course of these discussions, after a number of requests or suggestions which he had not followed up, I finally succeeded in extracting from him a list of the statutes in the drafting of which he had been largely concerned. He did not claim to be the sole draftsman,

but my experience with him was such that it is safe to guess that the ideas suggested and, to a very considerable extent, the careful phraseology of these acts as they were originally passed came from him. Some of these statutes have been referred to in general terms in the Resolutions.

“The list which he gave me was as follows:

- 1874, c. 248, s. 1 (separate jury list &c).
- s. 2 (questions at trial, cf. 1915, c. 185).
- s. 3 (speedy trial, affidavit of no defence).
- 1877, c. 178, s. 1 (general equity jurisdiction).
- 1883, c. 223 (except s. 1; equity procedure, and equity defences in actions at law with forms attached).
- 1884, c. 293 (equitable claims against insolvent estates).
- 1884, c. 132 (correcting mistake in P. S. as to conveyances, husband & wife).
- 1885, c. 384 (monthly return-days and procedure in S. J. C. and Sup. Ct.).
- 1888, c. 273 (effect of “dying without issue”).
- 1888, c. 290 (practice on appeals from Probate Courts).
- 1888, c. 329 (correcting mistake in *Stults v. Silva*, 119 Mass. 137 as to promissory notes).
- 1891, c. 354 (conveyance of land by disseised owner).
- 1891, c. 415 (equity jurisdiction &c. of Probate Courts).
- 1892, c. 118 (revocation of will by marriage).
- 1906, c. 342 (practice as to matters in abatement).

From my personal knowledge, I can supplement this list of statutes which were largely the result of his work by the following additions:

- 1913, c. 716 (to simplify legal procedure).
- 1915, c. 185 (relative to procedure in respect to practice at trials).
- 1915, c. 146 (simplifying certain details of pleading and practice).
- 1915, c. 151 (materially simplifying certain probate proceedings).
- 1916, c. 108 (relative to contingent remainders).
- 1918, c. 68 (relative to the powers of trustees in changing investments).
- 1918, c. 93 (relative to conveyances by a person to himself and others).
- 1919, c. 274 (relative to appeals from the probate courts).

"Between 1916 and 1920 while the Commissioners to Consolidate the Statutes, recently adopted as the General Laws, were at work, Mr. Thorndike submitted a series of carefully prepared suggestions for corrections or improvements in the statutes, each one covered, as usual, with a detailed explanatory note containing a history of the point. A number of these suggestions found their way into the final revision of the statutes. They cover about thirty-eight typewritten pages and deal with many details of practice.

"In addition to this, the greatest service which he rendered to the bar in connection with the preparation of the General Laws was the preparation of the forms of pleadings which appear at the end of chapter 231. A set of forms substantially like those attached to the Practice Act of 1851 was attached to the chapter relating to pleading and practice of the Public Statutes of 1880. These forms were omitted, apparently as unnecessary, from the Revised Laws of 1902. In the report of the joint committee of the legislature on the General Laws, it is stated in a note to Section 147 of Chapter 231 that:

"There has been a wide demand from the bar for the restoration of these forms to the statutes so that they may be readily accessible, and for their revision so that they may be correct and authoritative." Accordingly, "the forms following this section are based upon those appended to Public Statutes, c. 167. They have been revised and brought up to date by the addition of several modern forms and the making of necessary changes in many of the old forms to fit present practice."

Not only that, but many of the forms are supplemented by explanatory notes. On turning to the supplementary report of the Commissioners in January, 1920, we find that it concludes with the sentence:

"We desire to acknowledge particularly the time freely given by John L. Thorndike, Esq., who, among other things, prepared the forms appended to chapter 231."

I remember when I called this sentence in the report to his attention that he was somewhat disturbed by it.

"In connection with his drafts of these various acts he pre-

pared careful explanatory notes to almost every section. Since the 'Massachusetts Law Quarterly' was established, we have printed for convenient reference these explanatory notes of such statutes as were drafted by Mr. Thorndike. It is not uncommon within a comparatively few years after the passage of a statute, for many persons, in the distractions of modern business, to forget the specific reasons for its passage and for the use of certain language which may have been the result of prolonged discussion and careful study. Accordingly, such notes are apt to be found of practical value at any time.

"The reference to the 'Massachusetts Law Quarterly' suggests another matter of which I wish to speak in connection with Mr. Thorndike. He was interested in the experiment of this magazine from the start and was always ready to contribute either articles or notes which the bar might find practically useful or interesting in connection with some question not generally understood. He not only helped in this way, as well as with criticism or suggestion; he also offered on several occasions to contribute financially if it was necessary in order to keep up the magazine. We were not obliged to call upon him for such assistance, but the knowledge that he stood ready to contribute, made the problem easier, particularly after the cost of paper and printing began to rise.

"Some months before he was obliged to leave his office in June last, I had asked him to prepare a draft of an act providing procedure for declaratory judgments with explanatory notes in order that it might be submitted for consideration of the Judicature Commission, which was then in session. He told me several times that he was doing this and hoped to let me have it in the summer, but he did not have it in such shape that he was ready to submit it before he was taken ill.

"Several drafts of statutes which he had prepared with notes were submitted to the Judicature Commission and the results of some of his suggestions and his work appear in the drafts of acts recommended to extend the concurrent jurisdiction of the Superior Court; to relieve estates of the unnecessary expenses of appraisers; to relieve the probate records of the unnecessary burden of probate bonds where no sureties are required, and to do away with the perfunctory and useless requirement of certifying that demurrers are not intended for delay.

“While some of the statutes which he drew dealt with general matters and have had far-reaching results such as those relating to equity practice and procedure in the various courts, others have dealt with details, some of which to many lawyers may seem small and comparatively unimportant. Many of us are apt to accept the existing system, whatever it is, with its defects and inconveniences because it seems too much trouble to improve it. Mr. Thorndike felt differently. He realized that careful attention to one detail after another would, in the long run, result in making life much more convenient for the bar, less burdensome and less expensive for the litigants, and would tend toward better results in the administration of justice. He studied and grasped our common law system of pleading and practice both in its older and more complicated forms and in the looser and less technical forms of today as a master of his art studies a machine intended to produce practical results. He studied the art of draftsmanship both as to form and substance in the same way. He was undoubtedly, as is suggested by the facts stated in the Resolutions, one of the most expert draftsmen that the Massachusetts bar has produced during its long history. Members of the bar have not always agreed with some of the changes in detail which he proposed, but in regard to most of them, and particularly those of a broader character relating to the development of equity jurisdiction in this court, in the Superior Court, and in the Probate Court, those acts of 1877, 1883, and 1891 have brought about a freedom and convenience of action and a simplicity and directness of remedy with which the bar is so familiar today that most of its members do not realize that it did not always exist in Massachusetts. The bar has been scolded or abused for not improving itself and has been surfeited with every variety of suggestion and loosely drafted proposal supported by much sentimental enthusiasm. Mr. Thorndike was not a law reformer of this character. He knew the value and importance of the power of statement, whether in the drafting of statutes, of forms, or of explanations of rules of law, and he contributed his own unusual power of statement, whenever he saw an opportunity of doing so, to the practical service of the Commonwealth.

“Mr. Thorndike's last public service to the profession forms a fitting climax to his work. His law library, containing,

probably, the most valuable set of Massachusetts Reports in existence because of his continued and careful marginal notes, was given by his will in trust for the use of the justices of the Supreme Judicial Court."

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*Note.*

In the foregoing story of Mr. Thorndike, reference is made to the explanatory notes which he prepared in connection with the various sections of the statutes which he drafted. These notes are of practical value because they were submitted in print to the legislative committee as an explanation of the reason for each section of the different acts. For this reason, it may be convenient for the bar to have them listed for ready reference. While some of the notes were joint productions, the greater part of them represent the work of Mr. Thorndike.

For notes on 1913, c. 716 relative to legal procedure, see report Committee on Legislation of the Massachusetts Bar Association for 1913, pp. 32-39. This report appears as a separate pamphlet but may also be found in Vol. IV of the bound reports of the Massachusetts Bar Association, p. 98. See further a note on practice prepared for the American Bar Association and reprinted in the footnote, pp. 24-25 of the report of the Committee on Legislation of the Massachusetts Bar Association for 1914. This report appears in pamphlet form and also is bound up at the end of Vol. V of the Massachusetts Bar Association reports.

For note on 1916, c. 108 relative to contingent remainders, see report of Committee on Legislation for 1914 above referred to, pp. 54-56. This act was intended to complete a step which was partly taken by the Revised Statutes of 1835 and was explained by the commissioners on that revision. Cf. 28, Har. Law Rev.

For note on 1915, c. 151, simplifying probate proceedings, see report of Committee on Legislation of Massachusetts Bar Association for 1915, pp. 114-120.

For note on 1915, c. 185 relative to practice at trials, see reprint and explanatory note bound up at the end of the report of the committee for 1915 above mentioned and introductory note on pp. 111-112 of the same report. This report for 1915 appears only in pamphlet form and is scarce. Copies can probably be found in the law libraries throughout the state.



For note on 1918, c. 68 relative to powers of trustees in changing investments, see III Mass. Law Quart., May, 1918, 282.

For note on 1918, c. 93 relative to conveyance by a person to himself and others, see III Mass. Law Quart., May, 1918, 286.

For note on 1919, c. 274 relative to appeals from probate courts, see IV Mass. Law Quart., May, 1919, 240-249.

The foregoing notes contain detailed explanations of reasons as submitted to the legislative committee for the wording of almost every section of these various acts and in many cases show the legal history of the points covered by the different sections.

F. W. G.

## DISCUSSIONS IN REGARD TO THE SHEPPARD-TOWNER ACT.

The February number contained certain suggestions as to the Sheppard-Towner Act and a reference to Representative Shattuck's speech in the House. The importance of the question, the fact that the attorney-general has since rendered an opinion that the act is in violation of the Federal Constitution, and the joint order of both houses of the legislature authorizing him to bring suit in the name of the Commonwealth to test the validity of the act, make it desirable that the whole matter should be more fully explained. Accordingly, Mr. Shattuck's speech, the opinion of the attorney-general, and the order of the legislature are here reprinted together with an additional discussion of the Federal tax burdens of Massachusetts by Mr. Alfred D. Chandler which appeared in the press.

### REMARKS OF HENRY L. SHATTUCK

(HOUSE DOC. 1354.)

Remarks of Representative Henry L. Shattuck of Boston in the House of Representatives, March 2, 1922, speaking to the question of the adoption of a new draft of an order introduced by Representative Eben S. Draper of Hopedale on February 16, and reported by the Committees on Rules of the two branches, acting concurrently.

### NEW DRAFT OF ORDER

*Whereas*, There is a growing tendency in the national Congress to undertake governmental activities which have formerly been left solely to the jurisdiction of the several states; and

*Whereas*, The people of this Commonwealth are required to pay to the federal government through the various channels of federal taxation sums vastly greater than the amount of reimbursement or subsidy received by this Commonwealth on account of various federal grant bills already enacted into law; and

*Whereas*, Full and complete information is necessary in order to protect the rights of the Commonwealth and its taxpayers; therefore be it

*Ordered*, That the Supervisor of Administration is hereby directed to report to the General Court a complete list of all federal acts now in operation whereby Massachusetts receives subsidies from the federal treasury for carrying on local government work in Massachusetts, particularly the Department of Agriculture, the Department of Conservation, the Department of Education, the Massachusetts Agricultural College and the Massachusetts Nautical School, the Department of Public Health, the Department of Public Works and the Military Department of the Commonwealth, with the year in which federal work was started in each case, the amounts received from or expended by the federal government, the amounts expended by the Commonwealth, and an estimate of how much would have been saved to the taxpayers of the Commonwealth through decreased federal expenditures and thereby decreased federal taxes if such work within the Commonwealth had been done exclusively with funds of the Commonwealth and if no funds for such purposes had been contributed by federal government to Massachusetts or any other state. And

*Whereas*, There is now pending in the General Court a bill, House, No. 181, being "An Act accepting the provisions of an act of Congress relative to the promotion of the welfare and hygiene of maternity and infancy, and providing for co-operation with the federal government"; and

*Whereas*, Doubt exists as to the constitutional right of the federal Congress to enact said federal act, being the Sheppard-Towner Act, so-called; therefore be it further

*Ordered*, That the Attorney-General is hereby requested to transmit to the General Court his opinion on the following questions:—

(1) Is the act of Congress, approved Nov. 23, 1921, entitled "an Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes", within the constitutional powers of the federal government?

(2) Would The Commonwealth of Massachusetts, by the acceptance of said act, waive its rights as a sovereign State to contest the constitutionality of said act before the courts of the United States?

(3) If, in his opinion, said act is unconstitutional, what procedure should the Commonwealth now adopt to raise the question of constitutionality before the federal courts and to protest against the collection of money in this Commonwealth by federal taxation to provide funds for the operation of said act?

#### REMARKS

Mr. SPEAKER:—Of late years many laws have been passed by Congress providing subsidies for agriculture, highways, health,

education and other purposes, and there is a constant tendency to undertake many functions which until recently were thought to be of domestic concern.

All these new undertakings entail an ever-increasing Federal expense. In the fiscal year ending June 30, 1916, Congress appropriated for the expenses of the Federal government \$678,677,859. In the current fiscal year the appropriations total \$3,960,364,621, or over six times the appropriations of 1916. The internal revenue taxes alone collected by the Federal government in Massachusetts in 1921 amounted to \$259,865,213.85,—over a quarter of a billion dollars in one year, and a sum over six times larger than the total of \$39,736,266.33 appropriated in 1921 for running our entire State government.

Formerly, the main sources of Federal revenue were from the tariff and from liquor and tobacco. The burden of these taxes rested upon the several States substantially in proportion to population and consumption.

Today, the main sources of Federal revenue are the individual and corporate income taxes and the inheritance tax. The burden of these rests with peculiar weight upon Massachusetts and the other highly developed industrial States, and it appears that much of the money collected by the Federal government in Massachusetts is expended upon work in other States. This constitutes a great drain upon the resources of Massachusetts, and adds to the cost of living of all her inhabitants, whether they directly pay much or little in taxes.

Let me illustrate the statement that the burden of these taxes falls with special weight on Massachusetts. While, as I have said, Massachusetts turned over to the Federal government in 1921 the huge sum of \$259,865,213.85, Alabama, with a population nearly two-thirds that of Massachusetts, contributed only \$18,429,531.41, or about 7 per cent of the amount collected in Massachusetts, and Mississippi, with a population nearly one-half that of Massachusetts, turned over only \$8,996,571.95, or less than 4 per cent of the amount collected in Massachusetts.

Massachusetts should therefore consider with special care all projects for Federal activities, involving, as they all do, the expenditure of large sums of money.

The object of the order under discussion is, first, to obtain

from the Supervisor information as to activities of a local nature on which the United States has already embarked, as to the amount expended upon them, and the amount Massachusetts loses in the transaction.

To reduce the problem to its simplest terms, let us suppose that the sole function of the United States was road building, and that \$100,000,000 was annually collected by income taxes, of which \$5,000,000 came from citizens of Massachusetts, but that only \$2,000,000 was spent on Massachusetts roads. It is obvious that Massachusetts loses \$3,000,000 on the transaction, and would be \$3,000,000 better off if it built its own roads with its own money.

We are told that if we will appropriate a certain sum the Federal government will "give" us an equal sum, but this Federal money is not really a gift. It is a return of perhaps 30 cents on each dollar of additional Federal taxes collected from our citizens to meet the total outlay among the several States. By every such transaction we lose, and the majority of the States gain.

The second part of the order raises the question of the constitutionality of these practices, and, more specifically, of the Sheppard-Towner Act, a bill for the acceptance of which is now before us. This act gives outright to each State the specific sum of \$10,000 in the first year and \$5,000 thereafter, irrespective of population, and supplements this with a further sum of \$1,000,000 to be apportioned among those States which appropriate a like amount, \$5,000 to each, and the balance according to population. The expense rests with special burden on Massachusetts and the other highly developed industrial States. For example, Nevada, with a population of only 77,000, gets the same specific appropriation as Massachusetts, with a population of nearly 4,000,000; and Mississippi, which pays less than 4 per cent of the internal revenue paid by Massachusetts, but has a population nearly half that of Massachusetts, and in addition gets an appropriation based on population nearly one-half as large as the appropriation based on population apportioned to Massachusetts. The fact is that a very small group of States, of which Massachusetts is one, pay most of the bills for the entire enterprise. The great majority of States get more than they contribute, and no wonder they are enthusiastic about this method of legislation.

The question we are now considering is not whether we approve or disapprove of legislation for maternity protection and care. For my own part, I believe the State should extend its service in these matters.\* We are dealing with the fundamental question of the power of the Federal government, a question which transcends in importance any specific piece of legislation which may be offered for our acceptance.

By Article X of the amendments to the Constitution, it is provided that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people. In other words, the powers of Congress are strictly limited to those delegated by the Constitution.

Unlike the Federal Highway Act, which may be supported by virtue of the specific delegation to Congress by the Constitution of the power to establish post offices and post roads and to regulate commerce, no specific power can be found in the Constitution to support the Sheppard-Towner bill. If constitutional, it must be supported solely on the power to lay and collect taxes, etc., to pay debts and provide for the common defence "and general welfare of the United States". But this clause gives Congress no power to legislate on any and all subjects it deems to be for the general welfare. Should any such construction be adopted, the very existence of the States would be threatened. Local self-government would be at an end. Congress would wield the supreme power. Every activity of our lives would be regulated from Washington.

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\* Since these remarks were printed the Massachusetts Legislature in its Supplementary Appropriation Bill passed at the close of the session on June 13th included, in items 567-568, \$15,000 for maternity work by the Department of Public Health. This based on an annual expenditure of \$40,000 to \$50,000 in addition to the \$16,000 which was appropriated for this purpose in the General Appropriation Bill. The work to be done will be similar to that which would have been done under the Sheppard-Towner Act if that act had been accepted.

With reference to this appropriation, the Supervisor of Administration in his report to the Governor submitting estimates for the Supplementary Appropriation Bill, said:

"For the protection and care of mothers, and conservation of the welfare of children, increased activity is recommended. In no phase of public health work is there greater promise of more immediate and lasting results in life saving and health promotion in proportion to the amount of money invested than for money spent for work along the lines of hygiene in maternity and infancy. I am, therefore, including the sum of \$15,000 to be used by the Department of Public Health in extending its activities in this field."

And we should soon be in the condition of France, where every detail of government is regulated from Paris, and which in treatises on government is cited as a horrible example of bureaucracy gone mad. In fact, by reason of the immense size of our country, and the great diversity in climate, needs, and conditions, the evils of bureaucracy would be far greater.

It is high time that we should put this Federal power to the test, and that we should seek information from the Supervisor of Administration and advice from our Attorney-General, to the end that we may act advisedly on this important question.

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## THE FEDERAL TAX BURDENS OF MASSACHUSETTS

*(Reprinted from the Boston Herald of April 9, 1922)*

The Boston Herald's editorial of March 28, entitled, "We Are Taxed to Death," which gives impressive data as to our state and local taxation, suggests the following contrasts as to the federal internal revenue contributed by taxpayers of Massachusetts, a state whose varied interests are in jeopardy, unless requisite restraint prevails in federal exploitation of some states for the benefit of others, and in state and local expenditures; and unless our national debt is judiciously limited, and our vast war loans are promptly and wisely refunded.

The 1,300 miles of Pacific Ocean frontage of the United States, between the Mexican border on the south and British Columbia on the north, form the western boundry of those three great states, California, Oregon and Washington, renowned for their mines, agriculture, horticulture, forests, fisheries, scenery and health resorts, and containing the flourishing cities of Los Angeles, San Francisco, Portland and Seattle, notable gateways in a great trans-continental, trans-Pacific and Oriental traffic.

The total area of those three great states is nearly 40 times that of Massachusetts, which has but about 200 miles of frontage on the Atlantic. Their total population exceeds that of Massachusetts by about one million and three-quarters, and their assessed valuation in 1921 exceeded that of Massachusetts by about \$1,600,000,000. Yet the contribution of Massachusetts to the federal internal revenue during the past four years, as reported, has exceeded that of those three great states by

over one quarter of a billion of dollars, or by \$252,484,986. Massachusetts paid toward the federal internal revenue for the years 1918-19-20 and 21 the sum, as reported, of \$1,049,432,931. California, Oregon and Washington paid in all \$796,947,945.

It appears that the federal records classify by the states their respective total payments for internal revenue, and not by what each of the thousands of municipalities contribute. But an approximation of what the internal revenue returns from each city and town in Massachusetts would reveal, may be derived from the percentages of what each contributes to the state tax, the apportioned details of which tax appear every year in the Acts and Resolves of Massachusetts.

Based on these percentages, the taxpayers in 12 of the 355 Massachusetts municipalities contributed more to the federal internal revenue during the past four years than did the entire state of California. Such contributions from those 12 were approximately \$614,000,000, while California's entire contribution for the same period was \$593,770,694. Those 12 in the order of the amounts they contributed, as thus approximated, were: Boston, Worcester, Springfield, Cambridge, New Bedford, Fall River, Lowell, Lynn, Lawrence, Brookline, Somerville and Holyoke. Indeed, those 12 appear to have contributed more to the federal internal revenue in those four years than any state in the Union, except New York, Pennsylvania, Ohio, Michigan and Illinois.

On bonded net state debts, computations published as of returns of 1918 showed that Massachusetts was then the most heavily indebted state per capita in the Union, the average per capita for all the states that had state debts being about \$5.50, that for Massachusetts being about \$24, and that for our Metropolitan District being as high as \$37. Those data are, of course, exclusive of the enormous federal internal revenue taxes.

No adequate provision has yet been made by Congress for the payment of the principal of the funded national debt, 20 odd billions of dollars, which, with interest during the next quarter of a century, will involve in all from 40 to 50 billions, with possible 10 or 15 billions more principal and interest for the proposed soldiers' "bonus".

It therefore behooves Massachusetts to regard these fiscal



issues as of basic significance, demanding prompt and correct treatment (1) to rescue that state from an ominous economic peril, (2) to strengthen credit, and (3) to promote commerce.

ALFRED D. CHANDLER.

BROOKLINE, April 3, 1922.

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On May 17, 1922, the Senate concurred with the House in the adoption of a joint order as follows (see Senate Journal, May 17, 1922) :

*Ordered*, That the Attorney-General be authorized and requested in his discretion to bring suit in behalf of the Commonwealth, in the name of the Commonwealth or otherwise, and in such court or courts as he may deem expedient, for the purpose of testing the constitutionality of the act of Congress, approved November twenty-third, nineteen hundred and twenty-one, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes", known as the Sheppard-Towner Act, and to enforce and protect the rights and interests of the Commonwealth and its citizens as they may be affected thereby.

This order was adopted after the Attorney-General had rendered the opinion which appears in the following pages.

# THE OPINION OF THE ATTORNEY GENERAL.

## HOUSE . . . . No. 1660

### *The Commonwealth of Massachusetts.*

DEPARTMENT OF THE ATTORNEY-GENERAL,  
BOSTON, May 2, 1922.

*To the Honorable Senate and House of Representatives, State House.*

GENTLEMEN: — You have requested my opinion on the following questions:

“(1) Is the act of Congress, approved November twenty-third, nineteen hundred and twenty-one, entitled ‘An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes’, within the constitutional powers of the federal government?

(2) Has the Commonwealth of Massachusetts any right, as a sovereign State, to question the constitutionality of said act?

(3) Would the Commonwealth of Massachusetts, by the acceptance of said act, waive its rights as a sovereign State, if such rights exist, to contest the constitutionality of said act before the courts of the United States?

(4) If, in his opinion, said act is unconstitutional, what procedure can the Commonwealth adopt to raise the question of constitutionality?”

It is a matter of considerable delicacy for a State official to venture to pass upon the validity of acts of Congress and the rights of sovereign States before the Supreme Court of the United States, and it is with some hesitation that I undertake to comply with your request. It would seem, however, that it is within the statutory duty imposed upon me, as that duty has been construed by my predecessors in office, to give you an opinion upon questions of law when such opinion is requested in order that you may be informed as to your powers and duties with respect to pending matters of legislation.

I. The act of Congress, approved November 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes", commonly known as the Sheppard-Towner Act, authorizes annual appropriations "to be paid to the several States for the purpose of co-operating with them in promoting the welfare and hygiene of maternity and infancy". It contains provisions substantially as follows:

It authorizes the appropriation, for the purposes of the act, of \$480,000 for the current year and \$240,000 for subsequent years, for a period of five years, to be equally apportioned among the several States, and an additional sum of \$1,000,000 a year, for a period of five years, to be apportioned \$5,000 to each State and the balance among the States in proportion to their population, with a proviso that no payment out of the additional appropriation shall be made in any year to any State until an equal sum has been appropriated by such State.

The act creates a "Board of Maternity and Infant Hygiene", with certain supervisory powers. It provides that the "Children's Bureau of the Department of Labor" shall be charged with the administration of the act, and gives the Children's Bureau all necessary powers to co-operate with the States in such administration, for which purpose the Children's Bureau may deduct an amount not exceeding five per cent of the additional appropriations in any year.

Every State is required, in order to secure the benefits of the appropriations authorized, through its legislature to accept the provisions of the act and to designate or authorize the creation of a State agency to co-operate with the Children's Bureau.

Any State desiring to receive the benefits of the act is required by its agency to submit to the Children's Bureau detailed plans for carrying out the provisions of the act within such State, such plans to be subject to the approval of the Board.

Within sixty days after any appropriation under the act, the Children's Bureau is directed to make the apportionment provided for, to certify to the Secretary of the Treasury the

estimated expense of administration, and to certify to the Secretary of the Treasury and to the treasurers of the various states the amount apportioned to each State. Within the same period and from time to time thereafter, the Children's Bureau is directed to ascertain the amounts appropriated by the several States and to certify to the Secretary of the Treasury the amount to which each State is entitled by reason of such appropriation.

Each State agency co-operating with the Children's Bureau is required to make such reports concerning its operations and expenditures as shall be prescribed by the Children's Bureau, which may, subject to the supervision of the Board, withhold the certificate authorizing payment to any State whenever it is determined that the agency thereof has not properly expended the money paid to it or the moneys required to be appropriated by the State for the purposes of the act, an appeal being given from such determination to the President of the United States.

Thus in effect a system is created by which appropriations are to be made by the federal government and the States which accept the provisions of the act, plans are to be submitted to federal boards, the nature of which appears to be wholly undetermined, except that they must have some relation to the "welfare and hygiene of maternity and infancy" and are subject to certain restrictions stated in the act. Those plans are to be administered by officials, agents and representatives of the Children's Bureau in co-operation with the different State agencies, and control over the conduct of the State agencies is vested in the Children's Bureau and the Board by the provision authorizing the withholding of the federal appropriation in cases where it is determined as to any State that federal or State funds have not been properly expended.

The purpose and effect of the federal Constitution was to secure a federal government with limited and enumerated powers, for national purposes, reserving all other powers to the States and the people. *M'Culloch v. Maryland*, 4 Wheat. 316, 405; *United States v. Cruikshank*, 92 U. S. 542, 549-551; *Kansas v. Colorado*, 206 U. S. 46, 81. The powers

expressly granted to Congress, including the power to make all laws necessary and proper for carrying the powers enumerated into execution, are all stated in article I, section 8, of the Constitution. All powers not granted to the United States by the Constitution are reserved by the Tenth Amendment to the States or the people. *United States v. Cruikshank*, 92 U. S. 542, 551.

The powers given to the federal government are only those which are necessary to the existence and effective maintenance of the nation. There is no grant of power to Congress to regulate the internal affairs of the States (excepting that given by the Eighteenth Amendment). The police power is a necessary part of the sovereign powers of the States, and was reserved to them by the Tenth Amendment. Each State has the right and duty to provide for the general welfare of its people, and in those respects the authority of the State is complete, unqualified and exclusive. *New York v. Miln*, 11 Pet. 102, 139; *In re Rahrer*, 140 U. S. 545, 554, 555; *Keller v. United States*, 213 U. S. 138; *Hammer v. Dagenhart*, 247 U. S. 251, 274-276; *The Federalist*, No. 45.

The present act vests in the Federal government certain powers relating to maternity and infancy. These matters manifestly fall within the scope of the police power. Most of the expense will be borne by a small minority of the States, while a majority of the States will receive a corresponding benefit for which they do not pay. If the United States possesses no police power, as the Supreme Court of the United States has often held, it would seem that this act is an attempt to usurp an authority reserved to the States and to exercise it at the expense of a minority of them, of which this Commonwealth is one.

It appears from the debates in Congress that the proponents of this measure attempt to support it upon the ground that it is a provision for the general welfare of the people of the United States. The words "general welfare" occur twice in the Constitution, once in the preamble and once in article I, section 8.

The preamble is as follows:

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the

common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America."

The preamble, however, contains no grant of power. It is a mere statement of the purposes effected by the Constitution itself. *Jacobson v. Massachusetts*, 197 U. S. 11, 22; *Story on the Constitution*, § 462.

I pass, therefore, to a consideration of article I, section 8, of which the first clause is as follows:

"The congress shall have power — to lay and collect taxes, duties imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; . . . ."

It is plain that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, but a qualification of the first enumerated power "to lay and collect taxes, duties, imposts and excises". Argument is not needed to support this proposition because the authority for it is conclusive.

The history of the adoption of this clause is given in *George Ticknor Curtis's Constitutional History of the United States*, vol. I, pp. 518-521, as follows:

In the first draft of the Constitution the power to tax was stated in what was there article VII, section 1, in the following words:

"The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises."

5 Elliot's Debates, p. 378.

It was thought that there should be some restraint on the revenue power, with a view to prevent perpetual taxes of any kind. The matter was referred to a committee of detail, which reported the following addition:

"For payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except

what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than ——— years.”

5 Elliot's Debates, p. 462.

This was referred to a grand committee, which introduced an amendment making the whole clause read as follows:

“The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States.”

5 Elliot's Debates, pp. 506, 507.

This amendment was unanimously adopted. The provision for uniformity was added later.

5 Elliot's Debates, p. 543.

In *Loughborough v. Blake*, 5 Wheat. 317, 318, Chief Justice Marshall said:

“The 8th section of the 1st article gives to Congress the ‘power to lay and collect taxes, duties, imposts and excises,’ for the purposes thereafter mentioned.”

Again in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, 448, 449, the court said:

“The revenue of the United States is intended by the Constitution to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute all the express powers, ‘and all other powers vested by the Constitution in the government of the United States.’ ”

In *Ward v. Maryland*, 12 Wall. 418, 428, the power to tax was referred to as existing “by virtue of an express grant for the purpose; among other things, of paying the debts and providing for the common defence and general welfare”.

In *United States v. Boyer*, 85 Fed. 425, it was held that the “general welfare clause” did not confer any distinct and substantial power on Congress to enact any legislation, but constituted a limitation upon the taxing power.

The text writers also are agreed that the words "to pay the debts and provide for the common defence and general welfare of the United States" are to be construed as if they were preceded by the words "in order", or similar words amounting to a declaration of purpose. Story on the Constitution, §§ 906-911; Miller on the Constitution of the United States, pp. 229-231.

The form of the Constitution lends strong support to this construction. The document in the rolls of the Department of State shows that in article I, section 8, each of the enumerated powers is numbered, from 1 to 18 inclusive, the first being the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;" and the second the power "to borrow money on the credit of the United States;" and that each power is separated by a semi-colon. Curtis's Constitutional History of the United States, vol. I, pp. 728, note, 731.

While it seems to be definitely settled that the words "to pay the debts and provide for the common defence and general welfare of the United States" are not a substantive grant of power, there has been from the time the Constitution was adopted a controverted question regarding the interpretation of those words and their bearing on the power of Congress to appropriate money. Hamilton held that Congress had a power to appropriate as broad as the power to tax, and that the revenues of the United States could be appropriated for any public purpose connected with the general welfare of the United States. This doctrine was stated by Hamilton in his Report on Manufactures in 1791. It was adopted and followed by Story (§§ 975-992), and by President Monroe in his message respecting the bill for the repairs of the Cumberland Road, May 4, 1822. On the other hand, Madison held that the general welfare clause is merely descriptive of and limited by the specific grants of power to Congress contained in section 8, and that the power to appropriate money is also confined to the enumer-



ated powers. Madison expressed this view in the *Federalist*, No. 41, and the statement there made must be presumed to have had some effect in obtaining the ratification of the Constitution by the States. He renewed the same statement in his message vetoing the bill for internal improvements, March 3, 1817, and in a letter to Speaker Stevenson, dated November 27, 1830. Madison's view was supported and emphasized by Jefferson, as stated in his Opinion on the Constitutionality of a National Bank, February 15, 1791. See Tucker's *Constitution of the United States*, §§ 222-231.

The view that the general welfare clause is merely descriptive of the substantive grants of power which follow it in section 8 is supported by the circumstance that provisions for the common defence are contained in the grants of power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to provide for organizing, arming and disciplining the militia, while the other powers granted in that section are clearly provisions for the general welfare of the United States.

The question as to the extent of the general welfare clause in its application to appropriations of money was expressly reserved by the Supreme Court in *United States v. Realty Co.*, 163 U. S. 427, 440, where the court said:

"It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises."

But the question which I have to determine does not depend for its answer upon a solution of the controversy concerning the limits of the power of Congress to appropriate money. In fact, the Sheppard-Towner Act makes no appropriation of money. It merely purports to authorize sums to be appropriated, thereby announcing, it seems, an intention to appropriate at some future time. It does, however, establish a system by which States desiring to

secure the benefits of promised appropriations are required to submit plans for carrying out the provisions of the act to designated federal authorities for their approval, to make appropriations to match federal appropriations, and to cooperate with the federal authorities in the administration of the act, subject to the supervision of those authorities, who, if they determine that either federal or State funds have not been properly expended, may withhold the federal appropriation. This, in my judgment, is not an appropriation bill, but an attempted exercise of power over the subject of maternity and infancy, and thus an incursion into the field of the local police power, reserved to the States by the Tenth Amendment. The objections to the act go further in that the proposed appropriations are not *general* in their application, but are confined to those States which accept the act and appropriate their own funds to be used for its purposes. Hamilton, in his Report on Manufactures cited above, although contending for the broad power of appropriation, says that "the object to which an appropriation of money is to be made must be *general* and not *local*." For this reason the appropriations, if made, in my opinion would not be for the "general welfare of the United States", even if those words are given the broadest signification. Indeed it is yet to be determined that Congress has the power to appropriate to the States, according to any method of apportionment, revenues raised from the people of the United States for national purposes.

If the powers attempted to be exercised by the Sheppard-Towner Act are outside the powers conferred upon Congress by the Constitution and within the field of the powers reserved to the States, the act is not made constitutional and valid by the circumstance that those powers will only be exercised in or with respect to those States whose legislatures accept it; for Congress cannot assume and the State legislatures cannot yield the powers reserved to the States by the Constitution. They can only be granted to the federal government by an amendment to the Constitution. On this precise subject President Monroe, in his message vetoing the Cumberland Road bill, referred to above, holding that

Congress had not the power, even with the consent of the States affected, to establish turnpikes with gates and tolls as internal improvements, said:

“I am of the opinion that Congress do not possess this power; that the states, individually, cannot grant it; for, although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution, and in the mode prescribed by it.”

In reply to your first question I am therefore constrained to say that I am of opinion that the act referred to is not within the constitutional powers of the federal government.

II. Your second question, whether the Commonwealth of Massachusetts has any right as a sovereign State to question the constitutionality of the act, and your fourth question, what procedure can be adopted to raise the question of constitutionality, will be considered together.

It is well established that any person whose rights are directly affected by an act of Congress may question its constitutionality before the court, and that it is the court's duty in a proper case, where an act of Congress infringes upon the provisions of the Constitution, to declare that act unconstitutional and void. *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 308, 309; *Marbury v. Madison*, 1 Cranch 137; *M'Culloch v. Maryland*, 4 Wheat. 316, 400, 401.

But the right to declare an act unconstitutional can be exercised only when proper parties are before the court, in an actual controversy, involving the constitutional question in the determination of the rights of litigants. *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39; *Muskrat v. United States*, 219 U. S. 346, 361; *Fairchild v. Hughes*, No. 148, — October Term, 1921.

The most direct method of testing the constitutionality of the Sheppard-Towner Act, if not the only method, is by proceedings in equity against those officials of the federal government who are acting or preparing to act to carry its provisions into effect. By U. S. Const., art. III, sec. 2, the Supreme Court has original jurisdiction of all cases in which a State shall be a party. The inquiry, therefore, is, in the

first instance, whether the Commonwealth may maintain such a suit in the Supreme Court as party plaintiff, and secondly, whether the suit will lie against federal officials as parties defendant.

1. There are instances of suits brought by States which the Supreme Court has declined to entertain on the ground that they called upon the Court to determine questions which were political and not judicial. The most noteworthy of these cases is *Georgia v. Stanton*, 6 Wall. 50, where the State brought an original bill to restrain the Secretary of War and other officers of the government from carrying into effect the so-called Reconstruction Acts. The court held that the rights for which protection was sought were rights of sovereignty, that no rights of persons or property were being infringed, and that the questions were political; and they dismissed the bill for want of jurisdiction. The decision, however, seems to go no further than *Luther v. Borden*, 7 How. 1, and *Pacific Telephone Co. v. Oregon*, 233 U. S. 118, holding that it is for Congress and not for the court to decide what is the established government in a State, and to enforce the constitutional guaranty of a republican form of government, the questions involved being political and beyond the judicial power.

On the other hand, the court has from early times entertained suits to determine which of two States had political jurisdiction over disputed territory, since such a controversy is clearly justiciable. *Rhode Island v. Massachusetts*, 12 Pet. 657, 736-738; *Virginia v. West Virginia*, 11 Wall. 39. More recently the jurisdiction has in many cases been sustained in suits by States to enforce their sovereign rights, and as *parens patriæ* or representative of their citizens.

The question whether a State may sue as representative of its citizens was presented but not settled in *Louisiana v. Texas*, 176 U. S. 1, 19. But in later decisions this question has been answered in the affirmative, and the distinction made in *Georgia v. Stanton*, 6 Wall. 50, between rights of property and rights of sovereignty has been disregarded. These decisions have made it plain that suits by States will lie for the protection both of their own sovereign rights and

of the personal and property rights and welfare of their citizens generally. On these grounds suits have been sustained to restrain interference with the flow of rivers and water supply, and pollution of the air. Jurisdiction is accepted broadly wherever the controversy is justiciable in its nature, in recognition of the fact that the States in joining the Union relinquished the right they would otherwise have had to seek remedies by negotiation or force, that there should be some remedy for the settlement of disputes, and that one may be found in the constitutional provisions giving the Supreme Court jurisdiction of suits by States. *Missouri v. Illinois & Chicago District*, 180 U. S. 208, 241; *Kansas v. Colorado*, 185 U. S. 125, 206 U. S. 46, 83, 84, 89; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Virginia v. West Virginia*, 220 U. S. 1, 27; *New York v. New Jersey*, 256 U. S. 296, 301, 302.

The question whether an act of Congress is in violation of the reserved powers of the States and therefore unconstitutional seems clearly to be justiciable, and the Supreme Court has so decided in *Hammer v. Dagenhart*, 247 U. S. 251. In that case the court held that a United States district attorney should be enjoined from enforcing an act of Congress prohibiting the transportation in interstate commerce of products of child-labor, on the ground that the law was an invasion of the local police power, reserved to the States by the Tenth Amendment.

Where an act of Congress encroaches upon the rights reserved to the States by the Tenth Amendment, any State affected thereby must have the right to resort to some tribunal for the protection of those rights or be without remedy. That the States themselves are entitled to such protection by the judicial power, and that it is the duty of the court, in a proper case, to hold such an act unconstitutional, and to grant relief, has several times been declared. *Ableman v. Booth*, 21 How. 506, 519, 520; *Gordon v. United States*, 117 U. S. 697, 700, 701, 705; *Matter of Heff*, 197 U. S. 488, 505; *South Carolina v. United States*, 199 U. S. 437, 448.

If, for reasons stated, the Sheppard-Towner Act is uncon-

stitutional as representing an attempt by Congress to exceed its constitutional powers and to usurp the rights reserved to the States by the Tenth Amendment, it follows that the Commonwealth in a proper case can raise the question of constitutionality by bringing suit in the Supreme Court, if and when it is affected by the act.

The act does not confer upon the federal agencies created or designated by it any authority which operates in Massachusetts unless and until its Legislature accepts the act and makes the required appropriation. If the Legislature purports to accept the act, the right of the Commonwealth subsequently to complain that the act is unconstitutional, as hereafter stated in reply to your third question, will be open to serious question. If the act is not accepted and does not become operative within the Commonwealth, there would be no encroachment upon the police power of Massachusetts if the act should be put into effect in other States.

It does not follow, however, that the Commonwealth is not affected if the act is put into effect in other States. The grants to such States are to be paid out of the federal treasury. That treasury is replenished by internal revenue taxes paid by the people of the several States. It has been estimated that 5.66 per cent of those taxes are paid by the citizens of Massachusetts. If Massachusetts can and does accept the act it has been estimated that the return to it thereunder will be less than half the amount collected from its citizens. If Massachusetts does not accept the act its citizens will be taxed in order to carry into effect an unconstitutional law in other States. Assuming that a federal tax, otherwise lawful, imposed to raise revenues for lawful purposes does not become unconstitutional because it taps and diminishes a source of revenue available to the States (*Knowlton v. Moore*, 178 U. S. 41; *New York Trust Co. v. Eisner*, 41 Sup. Ct. Rep. 506), it does not follow that a State whose revenues are diminished by federal taxation imposed in order to execute an unconstitutional law is not so affected thereby that it cannot attack that expenditure in the Supreme Court of the United States. If the State is without remedy it is under the dilemma of consenting to be stripped

of a power reserved by the Tenth Amendment, in order to share in such unconstitutional benefits as Congress may choose to accord, or else of bearing unheard and without redress a part of the burden of conferring such alleged benefits on other States.

The right of Massachusetts to bring suit may be supported upon the further ground that the rights of its tax-paying citizens are invaded. It is doubtful whether taxpayers can maintain suits in their individual capacity to restrain an unconstitutional expenditure. See *Bradfield v. Roberts*, 175 U. S. 291; *Millard v. Roberts*, 202 U. S. 427, 438. There is, however, in my opinion strong argument for the view that the State can present the question on their behalf as *parens patriæ*, following the analogy of the nuisance cases already cited. If neither the State nor the taxpayer can sue, then there can be no remedy against such an unconstitutional exercise of power by Congress, although the issue is plainly justiciable.

The novelty of the question prevents a more definite answer to your inquiry. It is for the Legislature, in its wisdom, to determine whether a question of such vital importance to the State involving, as it does, a principle capable of indefinite application in the broad and paternalistic field of social welfare should not be submitted for adjudication to our highest court.

2. It remains to be considered whether suit may be brought against the federal officials whose duty it is to administer the act.

In *Mississippi v. Johnson*, 4 Wall. 475, the Supreme Court denied leave to file a bill against President Johnson to restrain him from putting the Reconstruction Acts into force. In *Georgia v. Stanton*, 6 Wall. 50, the Supreme Court dismissed a similar bill, as already stated. The circumstances which led to the passage of these bills, which were designed to create a temporary government for the seceded States, and the effect of later decisions afford ground for belief that those decisions would not govern in the present case.

Later cases hold that suit will lie where rights of property are unlawfully invaded by federal officers, and where the

United States is not a defendant or a necessary party. *United States v. Lee*, 106 U. S. 196, 204-208; *Noble v. Union River Logging R.R.*, 147 U. S. 165, 171, 172; *Belknap v. Schild*, 161 U. S. 10, 18; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Lane v. Watts*, 234 U. S. 525, 540. Furthermore, the court has frequently held broadly that State officers clothed with some duty in regard to the enforcement of the laws of the State may be enjoined from proceeding under an unconstitutional statute which they are about to enforce to the plaintiff's injury, and that a suit for such injunction cannot be regarded as a suit against the State. *Osborn v. United States Bank*, 9 Wheat. 738, 846, 857; *Davis v. Gray*, 16 Wall. 203; *Pennoyer v. McConaughy*, 140 U. S. 1, 10; *Smyth v. Ames*, 169 U. S. 466, 518, 519; *Ex parte Young*, 209 U. S. 123, 149, 155, 156; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165; *Truax v. Raich*, 239 U. S. 33, 37; *Greene v. Louisville & I. R.R. Co.*, 244 U. S. 499, 506, 507. Recently this same principle has also been extended to suits against federal officers seeking to restrain them from acting under statutes alleged to be unconstitutional. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619, 620; *Wilson v. New*, 243 U. S. 332; *Hammer v. Dagenhart*, 247 U. S. 251. Federal jurisdiction does not depend on diversity of citizenship, but exists because such suits arise under the Constitution or laws of the United States. *Ex parte Young*, 209 U. S. 123, 143-145.

In the *National Prohibition Cases*, 253 U. S. 350, two of the cases were suits by the States of Rhode Island and New Jersey against the Attorney General and the Commissioner of Internal Revenue, seeking to have the Eighteenth Amendment and the Volstead Act declared unconstitutional and void, and to enjoin the enforcement of the act. The main ground on which unconstitutionality was claimed was that the amendment and the act constituted an interference with the sovereign rights of the States to govern their internal affairs, that is, the local police power. Original bills in each of the two cases were permitted by the court to be filed (252 U. S. 570), and no question of jurisdiction was raised or reserved in the opinion by which all the suits were dismissed on the merits.



The opinion in the recent case of *Texas v. Interstate Commerce Commission*, No. 24 Original, — October Term, 1921, contains an intimation that the original jurisdiction of the court over suits where States are parties may be somewhat narrow, but the decision of the case goes on the ground that necessary parties were not before the court.

I conclude, therefore, that assuming that the Commonwealth may bring the suit as party plaintiff, the fact that the defendants would be federal officials would not defeat it.

III. Your third question is whether the Commonwealth by accepting the act would waive any right it may have to contest the constitutionality of the act before the courts of the United States.

The act provides that any State in order to secure the benefit of federal appropriations must accept the provisions of the act, designate the State agency with which the Children's Bureau is to co-operate, and submit to the Children's Bureau detailed plans for carrying out the provisions of the act within the State. It contemplates also appropriations by the State to match federal appropriations. These provisions, it seems to me must be construed as a proposal for a contract with the several States which, when accepted by any State, would constitute an agreement by the State to be bound by the terms of the act, if such an agreement could be made. Whether the State, acting by its Legislature alone, or in any manner other than that provided by the Constitution itself, can contract away its sovereign rights is a matter of grave doubt. But apart from any question of the validity of such a contract, there would appear to be an inconsistency in accepting the benefits of the act and then bringing suit to avoid its obligations and effect.

I am therefore of opinion that the passage of an act by the General Court accepting the provisions of the Sheppard-Towner Act would place the Commonwealth in a less favorable position to contest its validity.

Very truly yours,

J. WESTON ALLEN,  
*Attorney General.*



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THE CONFERENCE OF BAR ASSOCIATION  
DELEGATES AT WASHINGTON, D.C.,  
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## INTRODUCTORY STATEMENT.

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The February number of the "Massachusetts Law Quarterly" contains a preliminary report on the conference in Washington showing the vote of the Executive Committee of the Massachusetts Bar Association in connection with the appointment of delegates to the conference and containing a brief account of what took place there and some discussion of the problem as to educational requirements for admission to the bar.

It was stated that as soon as possible a fuller account of the conference and of the discussion would be printed in this magazine. Subsequently, the editor was informed that the entire proceedings had been printed and that a limited number of copies were being sent out to the delegates themselves and to secretaries of various bar associations, and that reprints for wider distribution might be obtained while the type was still standing. In view of the importance of the conference and of the ultimate practical results in the profession which are likely to come from it, it seemed advisable to secure reprints of what was said there for the information of those members of the Massachusetts bar who are interested in following professional developments and in order to have these proceedings in available form for convenient reference in future.

Those who do not find time to read the whole discussion will find a partial table of contents at the beginning and those who wish to see how it was presented from different angles may be interested in reading as follows:

Opening address by Mr. Root, p. 13; address by Chief Justice Taft, p. 25; (both in favor of the proposals before the meeting). Remarks of Mr. Keeble of Tennessee, pp. 66, 69 and 82 (in opposition); remarks of Dr. William H. Welch of Johns Hopkins, p. 84; (giving the angle of the medical profession). Remarks of Senator Thomas of Colorado, p. 148 (in opposition), and closing answer to him by Mr. Root, p. 171.

The greatest practical result of the meeting will undoubtedly be through the influence of the advice to men intending to study law that in the opinion of representative members of the bar from all over the country they should prepare themselves by at least two years of college study before going to a law school, and should choose those law schools which require at least that amount of preparation before beginning the law school course. This persuasive method of stirring the ambition as well as of appealing to the intelligence of students before they begin their preparation does not, of course, affect requirements for admission to the bar in any state. It simply has to do with the requirements which a man makes of himself, but gradually this plan will have a great influence. Indeed, that influence has already begun to show itself by the raising of the requirements in various law schools.

Senator Pepper in his speech (on page 191) said:

"This Conference seems to me to be *epoch-making*, because we, as representative American lawyers, have for the first time definitely recognized the public responsibility of the profession and we are taking measures to discharge it."

As to requirements to be made or allowed by statute or rule in different states, the practical situation to-day is reflected in the remarks of Mr. Keeble of Tennessee. As far as Massachusetts is concerned, as was stated in the February number, we need not disturb ourselves over the question whether the standard suggested by the Conference of Delegates is or is not too high, for we are so far below it to-day that the question is a purely academic one for us. The practical question in Massachusetts is not whether we shall require two years in a college, but whether we shall require something more than two years in an "evening high school or a school of equal grade," whatever that means. Any step, therefore, however slight, which raises that standard, will help the Commonwealth and its reputation before the country.

## A SUGGESTION FOR BAR EXAMINATIONS IN MASSACHUSETTS.

The remarks of Mr. Wormser, of New York (pp. 70-74), as to the importance of the study of the English language, and of English and American constitutional history leads to a suggestion, which has been the subject of casual conversation among Massachusetts lawyers, that these subjects are really an essential part of a legal education, as distinguished from a general education, and that they should be specified as the basis of a part of the legal examination for admission to the bar. There seems to be nothing in the present Massachusetts statute to prevent a higher requirement in the knowledge of these subjects as part of the *strictly legal equipment*.

The present statutes, G. L. c. 221, secs. 35-39, provide for a Board of Bar Examiners and in § 36 that:

“Said board may, *subject to the approval of the supreme judicial court*, make rules with reference to examinations for admission to the bar and the qualifications of applicants therefor, and determine the time and place of such examinations, and conduct the same; *provided*, that any applicant for admission to the bar who is a graduate of a college or who has complied with the entrance requirements of a college, or who has fulfilled for two years the requirements of a day or evening high school or of a school of equal grade, shall not be required to take any examination as to his general education.”

Sec. 37 provides that a citizen of the United States may petition

“to be examined for admission as an attorney at law, and, if found qualified, to be admitted as such, whereupon, *unless the court otherwise orders*, the petition shall be referred to the board of bar examiners to ascertain his acquirements and qualifications. *If the board reports that the petitioner is of good moral character and of sufficient acquirements and qualifications*, and recommends his admission, he shall be admitted *unless the court otherwise determines* . . . .”

There is nothing in these statutes which defines "general education" in such a way as to classify such subjects as are here suggested under the heading of "general" education as distinguished from what may be called the special field of "legal" education.

On p. 7 of the pamphlet containing the rules of the Board of Bar Examiners approved by the Supreme Judicial Court on May 25, 1921 appears the following statement as to the interpretation of the statutes by the board:

"A majority of said board construes section 36 above set forth as meaning that all applicants who are graduates of a college, or who have complied with the entrance requirements of a college, or who have fulfilled for two years the requirements of a day or evening high school or of a school of equal grade, or who have had an education equivalent thereto, shall, so far as their general education is concerned, be deemed qualified to be admitted to the bar, and shall be considered eligible to take the regular law examinations."

There appears to be nothing in this statement to indicate that the Board of Bar Examiners, *after a closer analysis*, would classify such subjects under the head of "general" as distinguished from "legal" education. In any event the statement of opinion of a majority of the board is not binding upon the court upon which the ultimate responsibility for admission and, therefore, of testing, and if necessary of defining the qualifications, seems to rest.

Aside from any question as to the power of the legislature to dictate to the court in this matter of standards for admission to the bar, the legislature has by the statutes quoted specifically expressed its expectation that the court shall take the responsibility of determining what are "sufficient acquirements and qualifications". The rules of the board require the approval of the Supreme Judicial Court. Even as a matter of statutory interpretation it is the function of that court to draw the line in a fair and reasonable manner as to the subjects which fall within the term "general education" as used in Sec. 36 as to which a limitation is provided and the "sufficient acquirements and qualifications" as to which the court is to determine

under Sec. 37. Any reasonable interpretation of the language of the two sections will involve a certain amount of overlapping, but the use of the English language in general and in the draftsmanship of legal documents, as well as the subject of constitutional and legal history seem to fall clearly within the reasonable and necessary "acquirements and qualifications" for membership in the bar as distinguished from "general education".

There is no reason to suppose that the legislature or any one else would seriously oppose such a course. It must be clear enough to laymen, as well as lawyers, that men cannot understand with any thoroughness the principles of the constitutional law or of the common law and equity in this country without a working knowledge of the history of the country and of England out of which our constitutions and system of law developed as practical measures from generation to generation in our government. Our law is not merely a set of arbitrary rules. Many important rules or principles of law are directly or indirectly connected with practical developments in our history.

A good working knowledge of these subjects can be readily acquired by a reasonable amount of general reading in easily accessible books by any student whether he attends any institution or not.

Rule IV of the Board of Bar Examiners approved by the court May 25, 1921 now provides that,

"The law examinations shall be upon the following subjects, or some portion thereof:

Contracts,	Negotiable Instruments,
Torts,	Bailments,
Real Property,	Carriers,
Criminal Law,	Wills,
Evidence,	Probate Law,
Equity,	Domestic Relations,
Corporations,	Trusts,
Partnership,	Constitutional Law,
Mortgages,	Bankruptcy,
Suretyship,	Legal Ethics,
Agency,	Pleading,
Sales,	Practice.



"The examination shall be conducted by printed questions, to be answered in writing. The board may give such supplementary oral examination as it deems proper."

It is respectfully suggested that an addition to this rule might be formulated by the Bar Examiners with the approval of the Supreme Judicial Court specifically requiring a knowledge of legal and constitutional history as a basis of part of the legal examination for admission. Such a rule might well specify certain books as suggestions to students such as:

Channing's "History of the United States".

Rhodes' "History of the United States" from the Compromise of 1850.

James Truslow Adams' "The Founding of New England."

Washburn's "Judicial History of Massachusetts" or Chief Justice Mason's brief account of the same.

The history of the Massachusetts Constitution as told in the Manual of the Constitutional Convention of 1917.

Hampton L. Carson's account of Early English Judicial History in 2 Mass. Law Quart. for May 1917.

Woodruff's Article on the History of Equity Jurisdiction in Massachusetts in 5 Law Quart. Review.

The Report of the Judicature Commission.

Harding's "Struggle for the Constitution in Massachusetts".

Robinson's "Jeffersonian Democracy in New England".  
Cushing's "Transition from Colonial to Commonwealth Government in Massachusetts".

Beveridge's "Life of John Marshall".

Chase's "Life of Chief Justice Shaw".

Pound's "The Place of Judge Story in the Making of American Law" 1 Mass. Law Quart., May 1916, 121.

Warren's "History of the American Bar" and "The Supreme Court in United States History".

Burgess' "The Middle Period 1817-1853" and "Reconstruction and the Constitution 1866-1876".

Morison's "Maritime History of Massachusetts".

These books or articles are suggested by way of illustration.

All of them, except Channing, Rhodes, Beveridge, and Warren's three volumes on the Supreme Court, are short. They represent various points of view. They are not school boys books and there is no reason why they should be. Other suggestions would doubtless be made so that a brief list could readily be prepared, the reading of which would increase the knowledge and improve the English of every future lawyer in the state in such a way as to help him to understand his profession better.

The ability to read such books and get a reasonable working knowledge out of them does not require special attendance at any school.\* It merely requires the willingness and ambition needed to take the trouble to read in order to be able to think intelligently from different angles and with some judgment about our laws and the reasons for their existence. No legislation or school is needed for the purpose and most men, who have any taste for reading at all, will find the books mentioned readable and that they contain more dramatic interest than a moving picture show, if they are read with a desire to try to understand the human struggles, mistakes, and successes that have made our history and law. The mere suggestion of such books by the court would, in itself, lead many men to read and think about them. Mr. Henry Ford is reported to have distinguished himself recently by characterizing all history (except his own, apparently) as "bunk". But that statement, as Mark Twain remarked in his famous cable about the report of his death, is somewhat "exaggerated". The reading of such books and thinking about the story in them, for it is a story, and a good one, helps to give men a better sense of perspective and to cure some of their cynicism; and what has been called "the cancer of cynicism" is, perhaps, the most serious disease of the American bar to-day.

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\*The Massachusetts Bar Association has on hand a supply of copies of Chief Justice Mason's account of early Massachusetts Courts and also of the account of the "Constitutional History of the Supreme Judicial Court from the Revolution of 1813," which appeared in the Massachusetts Law Quarterly for May, 1917, and which contains Mr. Carson's story of Early English Judicial Experience, out of which our present judicial system developed, as well as the story of our own early experience. A number of these can be distributed without charge to law schools and public libraries if desired to help students to a fuller knowledge of our legal history. The association also has the plates so that more copies can be printed if needed. Dean Pound's account of Judge Story is also available.

As to testing the ability to express ideas in reasonably grammatical and intelligible English it is, of course, an obviously essential part of testing the purely professional qualifications of any man who wishes to exercise the privilege of arguing to a court and drawing pleadings, briefs, contracts, and other legal documents which affect the rights and interests of clients. It might well be tested partly by requiring the applicant to draw a bill in equity, a declaration, a contract, a deed, and a draft of a statute relating to given subjects. A lawyer is supposed to be able to do all of these things, with the exception, perhaps, of the statute, as soon as he is admitted to the bar and has taken the oath of his office. Accordingly, "Draftsmanship of Legal Documents" might well be added as a specific subject to the list in Rule IV. The ability to use the English language, however, should not be tested merely by the answers upon any one subject. The fairest plan is to use the answers on all subjects as a basis for testing the candidates in this respect. Brief making might also be considered as a specified subject for examination. A tentative draft of a rule and an explanatory note is annexed at the end of this discussion.

The present Rule IV provides that "The board may give such supplementary oral examination as it deems proper". It is a common opinion among members of the bar that no one should be recommended for admission whom the board has not seen and talked with, as no paper examination or written certificate of character can take the place of the "real evidence" of the man or woman who is asking admission. This is the theory on which the actual appearance of the applicant is required before the court at the time of admission; but, of course, as large groups are now admitted together, personal examination by the court is, perhaps, not practicable, although, if it could be arranged occasionally, it would have an invigorating effect all along the line. Since, however, the court has not time for such examination as a regular thing, many now believe that the theory should be revived in practice to the extent of a personal examination by the bar examiners appointed by the court. The admission of an attorney is as important a matter as the decision of any other civil cause and, in its effects, more important than many. The practice of

admitting "officers of the court" more or less by wholesale, like the somewhat similar practice in naturalization sessions of admitting men to "citizenship" by wholesale seems to be producing serious results.

In 1886, George O. Shattuck spoke of the "tendency toward chemical disintegration as the great foe to national progress". This tendency appears to have been making rapid strides in the legal profession in the last 25 years and the question is to what extent the public health can stand the effects of stunted growth and the rotting disease of cynicism and ignorance at the bar. To what extent are the principles of democracy being used as a disguise for the "cult of incompetence"? To what extent is the responsibility in the matter divided between the court and the legislature? In his book on "The Lawyer's Official Oath and Office", the late Josiah H. Benton quoted Chief Justice Paxson of Pennsylvania as follows:

"No judge is bound to admit nor can be compelled to admit, a person to practice law who is not properly qualified or whose moral character is bad . . . Whether he shall be admitted or whether he shall be disbarred is a judicial and not a legislative question", p. 6.

Courts of other states have applied the same principle. The question has never yet been judicially passed upon by the Supreme Judicial Court of Massachusetts. It seems clear, however, that, aside from any question of conflict of authority, the responsibility must be a professional and ultimately a judicial one and that if the court and the Board of Bar Examiners, in their rules, proceed to classify more accurately those subjects which are naturally an essential part of a reasonable professional training and add such subjects to their law examinations there will be more progress in this matter than if we carry on a distracting controversy, at the present time, as to requirements of a certain number of years of "general education" in some kind of educational institution.

The understanding of reasonable professional manners might also be given attention. It ought not to be necessary, as it was recently, for a judge of the Superior Court to remind a young member of the bar to rise, instead of slouching in his seat, when he addressed the court.

As far as the attitude of the Massachusetts Bar Association on this subject is concerned, as already stated, no action has been taken upon the recommendations of the conference. As explained in the February number, the Executive Committee voted on January 25 that the committee:

“appreciates and shares the hope of a gradual improvement in the educational standards for admission to the bar reflected in said resolutions. As to the method specified in the resolution of realizing that hope, the Executive Committee takes no action at the present time but authorizes the president to appoint three delegates, of which he shall be one, and in his discretion one or more alternates to represent this association at the conference, such delegates to be appointed as representative members of this association to vote in said conference in accordance with their individual judgment, but without authority to commit this association to any policy or course of action.”

Since the Washington conference, the National Association of Evening Law Schools has issued two bulletins, written by Gleason L. Archer, Esq., Dean of the Suffolk Law School and secretary of that association. Bulletin One is entitled, “The Two-Year College Proposal.” Bulletin Two is entitled, “Who is Really Behind the Movement for a Two-Year College Requirement?” These bulletins appear to have been widely circulated and copies of them were sent to the present writer as editor of this magazine. The “Foreword” and the “Conclusion” of the two bulletins contain a summary of the position taken, and are here reprinted for general information and consideration in connection with the general subject:

#### “FOREWORD.

“The National Association of Evening Schools is on record as opposing any lowering of educational standards for admission to the profession of law. The proposal to require two years of college training of applicants for the bar is, however, in its opinion an unreasonable and dangerous recommendation. It would bar over

ninety percent of our young people from aspiring to the profession and would deprive the legal fraternity of some of the greatest intellects of the rising generation . . .”

#### “CONCLUSION.

“The genuine advances in law school standards that have come to pass in recent years are advantageous and wholesome. The public and the individual student are alike benefited. If the University Law Schools, or day law schools in general, wish to maintain a partial or complete college requirement for the admission such an effort is praiseworthy from every point of view.

“It is only when they attempt to strike rival evening schools with a weapon that would prevent earnest and worthy men whom circumstances have denied college advantages from aspiring to the profession of law that they merit condemnation and earnest opposition. A conspiracy of Universities can be as arrogant and dangerous to the Nation as that of any other minority that seeks to dominate it, whether educationally, industrially or politically.

“The man who lacks early advantages should be encouraged and even required to spend long years in preparation for the legal profession. If there were evening colleges available, then a partial college requirement would not be unjust. But to require a college training in whole or in part when there are no evening colleges is to require the impossible.

“The foregoing recital has perhaps amply demonstrated that the two year college requirement is selfishly intended as a weapon to annihilate the evening law schools. But there is a greater issue than a factional fight between law schools. The evening schools of law will not survive anyway unless they are serving a public need.

“But the poor boy question is one of the greatest problems of the age. To leave open a door of opportunity through which the boy of ambition and strength of character, burdened though he may be by dependent relatives, may climb to the highest rung of the ladder for which

the Creator has endowed him is an imperative duty of the Nation if it is to live.

"The great geniuses in every field of life spring from the most unexpected sources. Thomas A. Edison, the greatest scientist of the present day, is self educated. Andrew Carnegie, whose philanthropy is on every hand, self educated, rose to the heights, in competition with college men. The same is true of John D. Rockefeller, James J. Hill, Edwin H. Harriman, Charles M. Schwab, Henry Ford and scores of other colossal figures in our National industries.

"A college requirement in the business world, and it might as reasonably be expected as a safeguarding of the public from business failures, would have denied to our Nation these pillars of its industrial greatness.

"The legal profession must not be denied the immense possibilities that may come to it from the accession of strong men who emerge from the multitude of the ninety-seven odd percent to whom college training is an impossibility."

The remaining contents of the two bulletins elaborate the arguments and specify the evidence upon which the arguments are based. The word "conspiracy" is being pretty freely used in these days, both in and out of court, in every direction so that, like other epithets which may be used in either direction in this controversy, its force as an argument is somewhat weakened. We may do better without epithets.

In order to avoid misunderstanding, I should, perhaps, state that I am not a supporter of a requirement by statute or rule in Massachusetts of "two years of study in a college" for all applicants for admission to the bar. I believe that the advice of the Washington conference to men intending to study law that they should attend a law school which requires at least this amount of preliminary preparation is sound, but that is very different from establishing such a requirement in the state for admission to the bar. I believe the present low educational requirements in Massachusetts tend to encourage young men to think that if they meet those low requirements they will have done all that is necessary to equip them for the bar and they

are then left for the rest of their lives with the handicap of an inadequate training, instead of being encouraged by a higher standard in the first place to train themselves to be better lawyers. I do not think that this is fair either to the public or to the men themselves because I believe that the same men might be made stronger, more capable, happier, and more useful to themselves and the community if their ambitions were aroused to train themselves more thoroughly at the beginning. As I stated in the February number, the prominence of lawyers in a democracy like ours is the result of an absolutely impersonal force which cannot be avoided. That force is the training needed to study and understand and apply principles of law.

Now, the opening sentence of the "Foreword" of the bulletin of the National Association of Evening Law Schools states that the association "is on record as opposing any lowering of educational standards for admission to the profession of law." Such a recorded negative position, however, does not hold out to the public any particular promise of improvement in the profession. A negative position as to "lowering", in any association of such institutions does not seem to be enough. If the word "conspiracy" is to be used at all in this matter, it is equally applicable to any association of institutions which "stands pat" on existing conditions. The opening paragraph of Mr. Archer's "Conclusion", however, contains apparently a very different spirit for it shows positive appreciation of the work which the university and day law schools, in general, have done in advancing law school standards.

What Dean Archer in his "Conclusion" calls "the poor boy question", is entitled to all the consideration that it deserves, but it should be looked at fairly and squarely and should not be complicated or bolstered with immaterial arguments. In the body of "Bulletin One", after reference to the struggles of the boy who is helping to support his widowed mother or his brothers and sisters, appear the following paragraphs:

"Suppose he is a man thirty to forty years of age. Suppose by merited promotions he has won high place in federal, state or municipal service and realizes that legal training would help him higher. Suppose, he has become



an official of a large corporation and needs legal knowledge to increase his usefulness. Suppose he is the executive head of a business of his own and a knowledge of law would be an immense asset.

"Can it be supposed that such a man, and there were hundreds of them studying law in the evening schools, can give up his position or his business, quit earning money, leave his family to shift for itself while he goes to college for a mental training perhaps inferior to what he has already gotten?"

Now, the court does not admit men to the bar as a stepping stone, or certificate of character, for public office, or for increasing the usefulness of a business man. The standards of study for admission must be adapted to vigorous young men at the age when they want to learn in order to practise the profession. Men "thirty or forty years of age" who are, and intend to continue, in politics or business and want to be members of the bar as an incident, or as a stepping stone, cannot expect the standards for admission to be adapted to *their* learning capacity or opportunities. Rule III of the Supreme Judicial Court \* does not seem to contemplate that they shall be examined for admission unless they intend to "*practise*". They should not be used, therefore, as arguments in the discussion of standards. There is certainly no democratic principle or "square deal" argument which entitles them to any special consideration whatever. If what they want is legal training, they can study law in any way they please, but they need not apply for admission to the bar, unless they really mean to join the profession in a professional sense, and they should not be allowed to block reasonable standards for young men of the age for genuine professional preparation. It is certainly fair to expect the older men to meet the tests of the rising generation and not to clog the wheels of progress.

As has already been stated, as far as Massachusetts is concerned, the requirement of two years in a college is a purely academic question. The question is, do we not need some improvement in the standards of admission and, if so, what and

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\* Rule III (established 1905) provides that "no person who does not intend to practise as an attorney in this Commonwealth shall be entitled to be examined for admission."

how shall we get it? I submit as the next step for Massachusetts an amendment to Rule IV as already suggested and an explanatory note containing suggestions as to books to be read by way of preparation. A tentative draft of such a rule and such an explanatory note are annexed hereto.

F. W. GRINNELL.

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TENTATIVE DRAFT OF A SUGGESTED AMENDMENT TO RULE IV  
AS TO "SUBJECTS FOR LAW EXAMINATION".

The law examination shall include also the general subject of constitutional and legal history, draftsmanship of legal papers and brief-making. The general ability to express ideas clearly in the English language shall also be tested by the examiners on the answers to the examinations in the various subjects or otherwise.

TENTATIVE DRAFT OF EXPLANATORY NOTE.

In connection with the subject of constitutional and legal history, the reading of the following books is recommended:

(Insert list of Books)

As to testing the ability to express ideas in the English language, this general test to be applied in all subjects is required because the power of clear expression in the English language is an essential part of the law examination for those who wish to be admitted to exercise the privilege of making arguments to the court, of drawing pleadings, briefs, contracts, and other legal documents which affect the rights and interests of clients. The applicant must expect to be called upon to demonstrate his power of expression by drawing a bill in equity, a declaration, a contract, a statute, or other documents and his power of arranging an argument in an outline brief.



**SPECIAL SESSION**

**ON**

**LEGAL EDUCATION**

**OF THE**

**CONFERENCE OF  
BAR ASSOCIATION DELEGATES**

**HELD UNDER AUSPICES OF THE**

**AMERICAN BAR ASSOCIATION**

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**MEMORIAL CONTINENTAL HALL  
WASHINGTON, D. C.  
FEBRUARY 23 AND 24, 1922**

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## AMERICAN BAR ASSOCIATION.

### SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR.

NEW YORK CITY, October 31, 1921.

*To Presidents of State and Local Bar Associations:*

Last winter a study of legal education was made by a special committee of the Section of Legal Education and Admissions to the Bar of The American Bar Association. On August 31 the special committee submitted its recommendations to the Section which approved them after very full discussion, and on September 1 these recommendations were adopted by The American Bar Association at its meeting in Cincinnati. I enclose a copy of the committee's report, on the last two pages of which you will find the text of the resolutions as adopted by The American Bar Association.

You will observe that a representative Conference on Legal Education is to be called for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles approved by the Association. This conference will take the form of a special session of the Conference of Bar Association Delegates and will meet at Washington in February.

It is most important that the delegates from state and local associations shall be men of standing and influence, who will be able and willing to give time and thought to the conference and to the constructive work which will follow it. The committee in charge hopes that most of the delegates will be practicing lawyers, although some law school professors will doubtless attend whose counsel will be of great value. The movement which has led to this conference is not initiated by law schools, but springs from a recognition by the members of The American Bar Association of the bar's obligation to protect the public and the profession from incompetent and unethical lawyers.

I am writing to you because of your interest in the subject and in the hope that you may cooperate with the other officers of your association to secure well-qualified delegates from your bar.

Yours very truly,

ELIHU ROOT,

*Chairman of Section.*





# CONFERENCE ON LEGAL EDUCATION

MEMORIAL CONTINENTAL HALL

WASHINGTON, D. C.

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## FIRST DAY'S PROCEEDINGS.

*Thursday, February 23, 1922, 11 A. M.*

The meeting was called to order by Clarence N. Goodwin, Chairman of the Conference of Bar Association Delegates.

### **The Chairman:**

Gentlemen of the Conference of Bar Association Delegates: It is a very pleasant thing for me that the first meeting of the Conference of Bar Association Delegates, to be held during my term of office as Chairman of the Conference, takes place here in the Capital of our nation, in this Memorial Continental Hall, lately the seat of a conference of such national and world importance, and to consider a subject of such vital concern to the profession and to the nation itself.

The proposition to be discussed, which will be presented by Mr. Root, is the recommendation of the American Bar Association, adopted at its last annual meeting, that hereafter two years in college and the equivalent to three years in a full-time law school, shall be required as a condition of admission to the Bar.

It is peculiarly fitting, it seems to me, that this proposal of the American Bar Association should now be submitted to this great congress of the bar associations of the country, including, as it does, delegates from the American Bar Association, every state bar association, and some hundred or more local bar associations.

It is a dramatic thing when the representatives of the American, the state and the local bar associations of the country convene in extraordinary session to consider a question which

touches so nearly the future well-being of the profession to which we belong.

Who are to concern themselves about such a question if not the lawyers themselves? Who can hope to speak with the slightest authority for the Bar except the accredited representatives of all the bar associations in the country at large?

The Delegates to the Conference do not come with instructions from their associations as to what they shall say or how they shall vote, but they come as men chosen on account of their eminence at the Bar, with a duty to hear, to give counsel, to confer, and finally, if possible, to arrive at a common decision which will express the thought and feeling of the Conference as a whole.

The history and the origin of the Conference, as well as the work which it has already done, also make it exceptionally fitting that it should take up the question of what ought to be required of those who seek admission to the Bar.

The idea of a Conference of all the bar associations of the country which should meet annually for common counsel, and which should bind them all together for the accomplishment of a common purpose and by this means raise the standards of the profession and bring about a better administration of justice, and the plans under which it was organized, were conceived by the man to whom the world is indebted for so many constructive thoughts and for so many noble and very lofty plans destined to be of the largest importance to the welfare of humanity and the peace of the world, the Honorable Elihu Root, of New York. At his suggestion, and in accordance with his ideas, the Conference was created in the year 1915. He was for several years its Chairman, and his leadership was responsible for establishing it as a potent and national institution.

It is fitting that these proposals with reference to legal education should be submitted to this Conference on account of the work that it has already done in investigating the conditions of the profession and making affirmative, constructive suggestions in regard to the means by which the character, fitness, efficiency and standing of the Bar may be improved and the administration of justice thereby advanced. In 1919, for example, after a discussion at the meeting of the Conference in

Boston relative to what constitutes the practice of the law, and the necessity for protecting the public and the profession from the unlawful activities of lay agencies, a special committee was appointed to present a brief on that subject; and after a very thorough and painstaking investigation, that committee, through its Chairman, William H. H. Piatt, of Kansas City, prepared a report exhaustively reviewing the authorities and submitting a definition of what constitutes the practice of law. This report was presented at the following meeting of the Conference in St. Louis in 1920, and after full discussion, the definition presented was adopted by the Conference. It seems very clear that the work of arriving at an authoritative definition of what constitutes the practice of the law, and making a distinction between those activities which lie exclusively within the field of the lawyer, and those which do not, was an exceedingly important step in the life of the profession.

But there is another part of the work of the Conference which marks it as a body peculiarly fit to take up the consideration of what ought to be the requirements of admission to practice.

At the Boston meeting in 1919, of which Mr. Root was Chairman, there was a vigorous discussion of how the Bar should be organized and governed, and of the proposition that the state bar associations of the country should be incorporated and should be made inclusive of the entire membership of the Bar.

While that meeting of the Conference arrived at no conclusion on the subject, it appointed a committee of five, of which James Byrne, now President of the Association of the Bar of the City of New York; Thomas W. Shelton, of Virginia; Clement Manly, of North Carolina, and W. H. H. Piatt, of Kansas City, were members, and of which I had the honor to be Chairman, for the purpose of investigating the question and reporting its conclusions at the following meeting:

This committee made a survey of the entire field and reported as its conclusion: That the Bar as a whole is composed of intelligent, high-minded, competent lawyers, devoted to their profession, and personally maintaining its high traditions; but that it suffers in reputation from the incompetence, the unfitness and the misconduct of a few, and that it can never attain the place in the public esteem to which it is entitled until it is made

self-governing and master in its own house; that the Bar, composed, as it is, of officers of the court, duly appointed in accordance with law, and in law and in fact officers of the Department of Justice, and therefore public officials, is as much a part of the court as is the Bench; that the Bar, in law and in fact, constitutes a body politic, should be recognized as such, and should be given power to determine the matter of admissions and authority to administer discipline—in short, the power to admit, to discipline, and to purge itself of unworthy members.

It was concluded, however, that as there appeared to be a distinct field for the voluntary and selective state bar association, that organization ought not to be incorporated and made inclusive of the entire Bar, but should be left in existence, while the Bar as a whole was endowed, through proper legislation, with the power and means of self-government.

Therefore, the recommendations now submitted for conference action come to a body which, during the last three years, has made itself familiar with the conditions existing in the profession, recognizes the worth, competency and high character of lawyers generally, but knows the necessity for making this high standard of the greater part uniform throughout the profession, and making it certain that not merely the majority, however large, but all of the profession shall attain to standards of fitness and worth that will make the word "lawyer" a guarantee of high character, learning and professional honor.

It was my privilege to be present at the last session of the Conference on the Limitation of Armament, held in this hall; as I sat here my thoughts went forward to this Conference so soon to be convened, and it occurred to me then that whatever is accomplished for the betterment of humanity and the peace of the world, comes from the conscious or unconscious application of the great fundamental principles of democracy.

Not all that was accomplished at Versailles was good; but all that was accomplished there that was good came from an acceptance of those great doctrines laid down in our Declaration of Independence, of the equal rights of all mankind.

Not everything that was desired was accomplished at the great conference so recently held here in this historic hall, but all the good that was here accomplished was made possible by the influ-

ence of those in every nation who believed in the common kindred and equal rights of men in every station and in every part of the world.

It occurred to me then that this same principle of human equality must be a decisive factor in all our deliberations. We affirm that we believe in equality before the law. But how can equality before the law be possible when the rich and powerful are represented in court by highly educated, thoroughly trained and most competent members of the profession, while a large part of the poor and ignorant who frequently find themselves in court opposed to the more fortunate, are so often represented by ignorant, untrained and incompetent men who have, through the laxity of our methods, been commissioned by the state with authority to counsel and advise and represent them?

The shrewd and powerful men and interests of large means are able to know who are competent and who are not, but how is the poor man, the ignorant man, to make any just estimate of who is capable of properly advising and representing him?

During my years as a trial judge I was frequently distressed by the fact that one side or the other in the case before me was so incompetently represented by counsel or represented by such ignorant counsel that, owing to the learning and skill of the attorneys on the other side, it seemed impossible to get the case properly before the court, or keep error out of the record.

During my years in the Appellate Court, we found ourselves constantly confronted with records which showed such palpable and unmistakable errors as to make it necessary to reverse the case, although it obviously had merit, and although it was almost a moral certainty that had the errors been eliminated the verdict and judgment would have been the same.

These miscarriages of justice, due to ignorance and incompetence of counsel, are largely beyond the power of the judges to control, or of rules of practice to remedy. It is to be remembered, however, that the men representing these unfortunate litigants were licensed by the state to practice law.

It seems little less than a crime for the state to certify to the competency, to the learning and to the ability of a man to represent his fellow citizens in court who is not learned nor

able nor competent to represent or advise anybody in any legal matter.

This question of what requirements for admission to the Bar are to be adopted has never been in our hands, and we are not as a body responsible for the standards that have been established. We do, however, have an influence, and to the extent that we have an influence, we are responsible, and to the extent that we are responsible, we have a moral duty to investigate and act.

We are assured from the investigations that we have already made that the standard and requirements already adopted are insufficient. We are here to discuss the question of how much farther we are to go. But obviously we must discuss and consider it primarily from the point of view of the welfare of the public rather than that of our own interests; although upon investigation it may well be found that the best interests of the public and the best interests of the profession are one and the same.

Secretary Harley then proceeded to call the roll, but upon motion by Martin Conboy, of New York, duly seconded, the calling of the roll was dispensed with.

Julius Henry Cohen, of New York:

Mr. Chairman, we are honored today by having with us a distinguished member of the Montreal Bar, Gordon McDougall. I move that his name be added to the roll and that he be given the privileges of the floor.

The Chairman:

The privileges of the floor we will gladly extend to the representative of the Canadian Bar Association.

And I may say now, for the benefit of the members of the Conference, that there are present delegates from law schools, and those delegates are here through our invitation as guests, without the right to participate in roll calls or to vote on any questions. They have, however, the privileges of the floor, which we are very delighted to extend to the distinguished representative of the Canadian Bar.

The Chairman then read in part the following telegram:

TONOPAH, NEV., February 22, 1922.

*William Draper Lewis,  
Conference on Legal Education,  
Washington, D. C.*

If suitable opportunity presents itself, please urge all conferees to make seasonable plans to attend San Francisco sessions of American Bar Association second week next August. This is a Pacific year in our national affairs, and western members are determined to make San Francisco sessions notable chapter in history of American Bar Association. We are overlooking no opportunity to press upon eastern members our earnest and insistent desire for their attendance and cooperation.

HUGH HENRY BROWN.

The Chairman:

Last June while acting as a University delegate to the Centennial of the University of Virginia, I visited Monticello and was impressed with the simple inscription designated by Thomas Jefferson as the thought by which he wished to be remembered. It was significant because he passed over the fact that he had been Minister to France, that he had been our first Secretary of State, that he had been President of the United States for two terms. I could not exactly recall what that inscription was, but I looked at a facsimile of it last evening, and it was:

Author of the Declaration of Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia.

The American Bar Association has chosen a distinguished gentleman to present to this Conference their program. It is not of deep significance that he has been a Senator from the State of New York, Secretary of State, and held many other high offices. All those offices and all those honors have been enjoyed by men of lesser stature. There are many things for which he will be remembered. I venture to say, however, that among that long list will be the fact that he was the author of the plan for the creation of the Permanent Court of International Justice, and I hope that the results of this and future conferences will be such that he will also be remembered as the Father of the Conference of Bar Association Delegates. I will ask Mr. Guthrie, Mr. Conboy and Mr. Wadhams to escort Mr. Root to the platform.

Elihu Root, of New York:

*Mr. Chairman, and gentlemen of the Conference:* Old Dr. Lieber, the great teacher of jurisprudence of the last genera-



tion, had posted on the wall of his lecture room the motto, "No right without a duty." It is my pleasant duty to present to you a certain action of the American Bar Association upon which that Association appeals to you for sympathy and assistance. It consists in certain resolutions designed to improve the standard of the incoming Bar, and it is the result of many years of discussion, many committees, many reports, many drafts of resolutions. For 25 years the American Bar Association has acted under a continually growing feeling that the Bar was not functioning quite right, and during all that time local associations and state associations have been appointing committees, receiving reports, and passing resolutions based upon the same feeling.

Some nine years ago the American Bar Association formally asked the Carnegie Foundation for the Advancement of Teaching, which had just accomplished a noteworthy study of the teaching of medicine, the results of which had been very salutary to the medical profession, to make a similar study of legal education. That was undertaken by the machinery of the foundation, and last summer the report of the gentleman who had been engaged in the study was produced. In the meantime the American Bar Association reorganized its branch devoted to legal education into a section on legal education and admissions to the Bar, with an executive council. The Section also appointed a special committee composed of half a dozen gentlemen from all parts of the country to take up the question as to what should be done to create conditions which would improve the efficiency and strengthen the character of those coming to the practice of law. That committee met in the City of New York and it sent out questionnaires all over the country to the people who were supposed to be best fitted to make suggestions, to the heads of all the bar associations, state and local, to all the law schools, and to a great number of leaders of the Bar in different parts of the country. They got great numbers of answers, and those they collated and digested.

Then the committee met again and they invited representatives of all sorts of experiences and opinions on the subject to come before them and instruct them. There was a long session in which the heads of the law schools and bar examiners and members of the Bar in active practice came in and talked to the

committee and answered questions. As a result the committee reported to the Section of Legal Education and Admissions to the Bar of the Bar Association a series of resolutions which they recommended, designed to take one step at least in the direction of having a more effective Bar, not only now but in the future. Those resolutions which were recommended by the committee went before the Section, at a largely attended meeting in Cincinnati last summer, and were fully debated. Representatives of certain law schools who were opposed came in and argued very fully in opposition. But they were adopted by an overwhelming majority by the Section and recommended to the Association, and in a very fully attended meeting of the Association there was another vote, and they were adopted then by an immense majority. I am now bringing them before you by the direction of the Association with a request for your kind consideration and all the help that you can give us.

(1) The American Bar Association is of the opinion that every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

(c) It shall provide an adequate library available for the use of the students.

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

(2) The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

(3) The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publications available so far as possible to intending law students.

(4) The President of the Association and the Council on Legal Education and Admissions to the Bar are directed to cooperate with the state and local bar associations to urge upon the duly constituted authorities of the several states the adoption of the above requirements for admission to the Bar.

(5) The Council on Legal Education and Admissions to the Bar is directed to call a Conference on Legal Education in the name of the American Bar Association, to which the state and local bar associations shall be invited to send delegates, for the purpose of uniting the bodies

represented in an effort to create conditions favorable to the adoption of the principles above set forth.

ELIHU ROOT, *Chairman*, New York, N. Y.  
HUGH H. BROWN, Tonopah, Nev.  
JAMES BYRNE, New York, N. Y.  
WILLIAM DRAPER LEWIS, Philadelphia, Pa.  
GEORGE WHARTON PEPPER, Philadelphia, Pa.  
GEORGE E. PRICE, Charleston, W. Va.  
FRANK H. SCOTT, Chicago, Ill.

You will perceive that the first part of these resolutions—all of the first two—is an expression of opinion by the American Bar Association. Of course that opinion cannot be changed here, in another meeting, differently constituted. What you can do, and what I hope you will do, is to range yourselves by the side of the American Bar Association to give effect to that opinion.

You will perceive that the second part of the resolutions directs action. It directs two kinds of action. First, the action which will be effective in itself; that is, the Council of the Section of Legal Education is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not, and to make such publications available so far as possible to intending law students. Now, that is going on and will continue to go on, and Mr. Sanborn, the Secretary of the Section, who is here, can give you information about the very gratifying results of the publication of these resolutions, in the way of responses from law schools, a large part of which have already announced their intention to make their qualifications conform to the qualifications that should be established in the opinion of the American Bar Association. So no matter what we do here, there will be put before the people of the country and the thousands of young men who are seeking admission to the Bar during this coming year, a list of the law schools which conform to the opinion of the American Bar Association as to what a law school ought to be, and a list of the schools which do not conform to the opinion of the American Bar Association as to what a law school ought to be, with the natural result that all the young men and young women who are able to do so will go to the first-class law schools and none who can get to the first-class will go to the others, and if they are true Americans, imbued with the traditional American impulse always to have the best, you will find the law schools that are what they ought to be

filling up and the law schools that are not what they ought to be dwindling.

The second line of action directed in these resolutions is what has brought us here. It is a direction of the Association to cooperate with the state and local bar associations, to urge upon the duly constituted authorities of the several states the adoption of the above requirements, and the direction for the calling of this Conference, for the purpose of uniting the state and local bodies in an effort to create conditions in the several states favorable to the adoption of these principles.

You see those are two quite separate and distinct lines of action to give effect to these standards: First, the direct communication to the people of the United States upon the authority of the members of the Bar Association of an opinion as to the kind of law school their young men shall go to, and second, an appeal to you members of the state and local bar associations to use your influence and power in the several states to get the state authorities to take over and put into force that same opinion.

Now, this appeal to you and to your associations is not without a basis in past history. The local bar associations have long been appointing committees, passing resolutions in some way to improve the standing and efficiency of the Bar, and particularly of the incoming Bar. And this is an appeal for that union which will make it possible for all the resolutions and all the good intentions of the state and local associations for 20 years past to become efficient and active.

There will be opposition to some of these provisions, and in order to determine how far the opinion of the American Bar Association is praiseworthy and sound and should be supported, it is important to look a little at the trouble which it seeks to cure. That there is trouble I think every one of us feels. It may not be trouble in this particular county, in this particular Bar, in this or that state; but it is trouble in so large a part of the Bar that it affects the whole Bar. You cannot have too many rotten spots in an apple and have the rest of it good. We have for years been hearing just such things as Judge Goodwin tells us out of his experience on the Bench, about the sacrifice of client's interests, increased expense, the continual delays, the sending back of cases for new trial, notwithstanding their merits,

owing to the inefficiency and incompetency of members of the Bar. Those reports have been coming from all over and they have blackened the name of the Bar. They have led the public to observing the manifold defects of our administration of justice—its delays, its technicalities, its repeated and oft-repeated appeals and reviews, its long delays which prevent the honest man of modest means from getting his rights, while the rich man, with abundant income, and the sharper, with subtle and adroit ingenuities, can put off indefinitely the granting of justice. That is the charge against us, against you and me; and what is worse still, it is a charge against our free institutions that is sapping the faith, the confidence, the loyalty of the millions of people in this land, in those institutions.

Apart from those evidences, there is enough in the general conditions to satisfy any one that either the Bar or somebody else is not quite doing its full duty. Vastly complicated our practice has become. The enormous masses of statutes and decisions have made it so. Twelve thousand to fifteen thousand public decisions of courts of last resort in a year! Twelve thousand to fifteen thousand more statutes from our Congress and legislatures! A wilderness of laws and a wilderness of adjudications that no man can follow, requiring not less, but more ability; not less, but more learning; not less, but more intellectual training in order to advise an honest man as to what his rights are and in order to get his rights for him. Are we doing it? No. The Bar stays still. It has been talking 25 years. The American Bar Association has been talking about it for 25 years, appointing committees, listening to reports and filing them. This is the first attempt, in any authoritative and conclusive way, to do something. I am here to ask you to help in it.

Not only has the practice of law become complicated, but the development of the law has become difficult. New conditions of life surround us; capital and labor, machinery and transportation, social and economic questions of the greatest, most vital interest and importance, the effects of taxation, the social structure, justice to the poor and injustice to the rich—a vast array of difficult and complicated questions that somebody has got to solve, or we here in this country will suffer as the poor creatures

in Russia are suffering because of a violation of economic law, whose decrees are inexorable and cruel. Somebody has got to solve these questions. How are they to be solved? I am sure we all hope they will be solved by the application to the new conditions of the old principles of justice out of which grew our institutions. But to do that you must have somebody who understands those principles, their history, their reason, their spirit, their capacity for extension, and their right application. Who is to have that? Who but the Bar? Is the Bar giving it? Is the Bar getting it? The public's judgment is that it is not.

Conditions have so changed from Abraham Lincoln's day that the problem is different and the opportunity is different. Not only that, but the material is becoming different.

I was for many years a member of the Character Committee in the City of New York, appointed by the Appellate Division of the Supreme Court of that Department, and year after year we used to sit, and all the applicants for admissions to the Bar came before us and presented their papers and submitted themselves to such examination as we saw fit to make regarding their characters. And every year, when it was all through, we were compelled to confess to each other that we really did not know anything about the character of nine-tenths of the young men who came before us. They would get somebody to sign the necessary papers, and they would furnish certain formal statements about their careers. A young fellow just applying for admission to the Bar has not much of a career. It is very difficult to tell much about his character. We could not keep a young man out because we did not know much about him. It would not be fair to deprive him of his chances. Nevertheless, I had, we all had, an uncomfortable and unhappy feeling that we were admitting to the Bar each year some scores and hundreds of young men without any warrant whatever for believing that they had the character that is the most essential thing in the administration of justice.

The old practice of Lincoln's time, under which a young man studied in a law office, got a little coaching, a little steering from the members of the firm, read a few fundamental books and became educated as a lawyer in that way, has passed. Here and there in the country districts it may remain, but by and large

it has gone. That path way is no longer open to the young man who is seeking admittance to the Bar. In its place has come the law school; and in place of that assurance which the old lawyer in whose office a boy had studied could give to the court upon his personal knowledge, has come the Bar examination.

Two things, I think, lie at the bottom of our difficulty here. One is that the old system which has passed away was a system that gave moral qualities to the boy. He took in, through the pores of his skin, the way of thinking and of feeling, the standards of morality, of honor, of equity, of justice, that prevailed in that law office; and the moral qualities are the qualities for the want of which our Bar is going down.

Lincoln did not need any such resolutions as we have here. Lincoln inherited and breathed in and grew into the moral quality that makes a lawyer prominent, that makes a judge great.

The other difficulty is that examination is wholly incapable of testing that moral quality of a man. The young men that I have been talking about, whom we have to see with doubt going through the examination and into the Bar were acute, subtle, adroit, skillful. They had crammed for their examinations. They could trot around any simple-minded American boy from the country three times a day. But the thing that we were troubled about in that Character Committee was: Have they got the moral qualities? And we had no evidence that they had. And the evidences are coming in all the time of a great influx into the Bar of men with intellectual acumen and no moral qualities. How are you going to get them? Not by an examination; not by going back to the law office. That is impossible.

There is another thing to be considered. A very large part of these new accessions, and particularly in the large cities, are of young men who have come in recent years from the Continent of Europe. They have come from countries where there is a highly developed jurisprudence. They have necessarily, by inheritance, all those predilections and fundamental ideas which differentiate the continental systems of jurisprudence from the Anglo-American system. Do not underestimate the importance of that. I am not saying that the systems of the countries from which they come are not just as good as ours. I am drawing no comparison. But they are different from ours. Do not mistake

that. I had many years ago to argue a case in the Supreme Court of the United States, the case of *Hilton vs. Guyot*—you will find it along about 30 years ago in the reports (159 U. S. 113)—involving the effect of a French judgment. After very careful and long continued study I came to this conclusion: That an American stood no chance in a French court and a Frenchman stood no chance in an American court. I have thought of that a thousand times since, when engaged in international affairs, and I have seen it illustrated over and over and over again. The great trouble in international affairs is that the people of two different countries have two different sets of pre-natal ideas in the backs of their heads. Every word that is said and printed and written receives one meaning against the background of one set of ideas, and another meaning against the background of the other set of ideas. If you have a week's conference, you can spend six days in trying to understand each other's back-of-the-head ideas. And if you can get a little glimmer of an idea of what the other fellow is really thinking about, then you can settle your difficulty in five minutes.

These young men to whom I have referred come here, and they are coming to our Bar by the hundreds, with continental ideas born in them. No cramming for an examination will get them out. They are not to be learned or dis-learned out of a book. Those ideas can be modified or adapted to our ideas only by contact with life—contact with American life—taking in, in the processes of life, some conception of what the American thought and feeling and underlying basis of honestly and justice is.

Now, how can you get it? The idea of this resolution, that the law school should require as one of its conditions for entrance two years in an American college, is an effort, and the only one that has been suggested, to require that these young men shall go and spend an appreciable time under such conditions that they will take in the morale of our country before they are admitted to the Bar.

I believe in the fundamental conceptions of justice and honor and good faith, out of which our American institutions grew. They were the conceptions that were brought out by struggle and sacrifice during the long centuries of the Anglo-Saxon fight for freedom. They received a new birth, a new commission upon the



American continent—an enlarged conception of individual liberty and manhood, of individual right, of justice, of duty to the state, of the common good, entertained by men who had no superiors, who looked up to no government above them, but *were* the government, through their own organization. That was the complex of conceptions that gave the formative power that has made this continent, that has carried the common law of England from ocean to ocean; that has made the individual enterprise of America, carried on by sovereign citizens, dealing with justice and rendering justice, a mightier force than the dictates of any empire or any sovereign.

I said a few moment ago that I do not criticize any continental view of jurisprudence. But I do take leave to say that we want *our* view here in this country to continue.

I do not want anybody to come to the Bar which I honor and revere, chartered by our government to aid in the administration of justice, who has not any conception of the moral qualities that underlie our free American institutions—and they are coming, today, by the hundreds.

I know of no way that has been suggested to assure to any considerable degree the achievement of such a view on the part of aspirants to the Bar except this suggestion that they should be required to go to an American college for two years and mingle with the young American boys and girls in those colleges, be a part of their life, and learn something of the community spirit of our land, at its best; learn something of the spirit of young America in its aspiration and its ambition, seeking to fit itself for greater things. That is what they will get in an American college.

Somebody sent me the other day a card that had been circulated from some night school suggesting that this was a snobbish proposal. He who sent it knew little of the American college. We are told that this will keep poor young men out. Keep them out! Do you suppose such a thing would have kept Lincoln out? I have been, within the last year, to three American universities, each one of which had over 11,000 students. I never saw a more inspiring spectacle than I did in going into the great reading room in the University of California and seeing there from a thousand to two thousand young men and women all at work,

reading. Oh, my heart grew lighter in its view of the future in the faith of that spectacle!

I know American colleges, and I have seen for 60 years the plain boys trudging over the hills to get an education in order that they might climb the heights of fame and fortune, in order that they might slake the thirst for learning, in order that they might make themselves something bigger and better; and I say to you there is no better democracy in this world than the democracy of the American college. And that is the great thing that is learned there; for in it the youth pass the most formative years of their lives before the spectacle of men who are happy in the pursuit of learning and of literature and of science—happy in their growth and achievements—without money, without display, without ostentation. There are today over 600,000 young Americans in these institutions. And can you tell me that a boy who is worth his salt, who is fit ever to have a client, who has the character that will enable him to assert and maintain rights, cannot find his way to one of those institutions and spend two years there? If he cannot, he does not belong in the Bar.

One other thing: Whence come these 600,000? Observe, that means every year that more young Americans are going into these institutions than there are in the whole Bar of the United States. They could duplicate the Bar of the United States every year, if all the youngsters that came out went into the Bar. Whence come they? They come from the people of every calling, all over our land, of every condition, from parents who are working hard to educate their children, and from conditions of life where the child has to serve itself. They are coming in response to the universal feeling of the American people that they must make progress. That is where these 600,000 come from. They come from a people who mean to do better, to be better, to be stronger, to do great and greater things.

Is the Bar alone to be free from that noble feeling? The Bar, which deems itself the guardian of the most sacred rights of humanity? Is the Bar to sit silent, passing futile resolutions expressing pious hopes, and unwilling that its ranks shall be elevated by marching side by side with all the rest of the great and aspiring American people?

There is no trouble about a young man getting a college education in this country today—not the least. There is money enough wasted by incompetent, slovenly, ignorant practice, keeping honest men out of their rights, filling up the time of the courts, frustrating efforts at more prompt disposal of cases, and the granting of justice—there is more money wasted each year than would be necessary to pay for the education in college of all the men that will apply for admission to the American Bar for the next 25 years.

One concluding thing: What is all this for? What is the vital consideration underlying all the efforts of the American Bar? We are commissioned by the state to render a service. What we have been talking about is the way of ascertaining or of producing competency to render that service. Upon what standard of judgment shall we consider and attempt to do that? Of our rights? Of the rights of the young men who come here crowding to the gates of our Bar? Is it a privilege to be passed around, a benefit to be conferred? Is there any doubt that that standard is inadmissible? Do we not all reject it?

The standard of public service is the standard of the Bar, if the Bar is to live; the maintenance of justice, the rendering of justice to rich and poor alike; prompt, inexpensive, efficient justice.

Shall we turn our backs on an effort to secure better public service, and go away and congratulate ourselves on the preservation of the privilege of charging fees for services, without regard to the great duty, the great obligation, the great responsibility, that our privilege carries with it?

The Bar of America has been fumbling for years, through the American Bar Association and state associations and local associations and in private conference and in public address, to find some way to render the public service that we all know we are bound to render, and that we all feel we are not rendering satisfactorily; and this is the one concrete and practical step proposed for the accomplishment of that purpose.

I hope that we shall have the enthusiastic and effective support of all the Bar associations of the country in the maintenance of that standard.

A recess was taken until 2 o'clock P. M.

## AFTERNOON SESSION.

*Thursday, February 23, 1922, 2 P. M.*

The Chairman:

Gentlemen of the Conference, yesterday afternoon, while we were enjoying Mr. Charles Butler's hospitality, I refreshed my mind with regard to the circumstances under which the inferior courts of the United States were organized and authorized. You will remember that the original proposition was that the federal jurisdiction of the United States should be exercised exclusively by a system of federal courts. Mr. Rutledge secured a reconsideration of that proposition and suggested that the original jurisdiction in federal matters should come before the state courts and that appeal and the right of review to the supreme national tribunal would be sufficient to safeguard national rights. Mr. Madison and Mr. Wilson, however, secured a compromise which gave Congress power to create, if it chose to do so, inferior tribunals, with the result that the judicial power of the United States is in a small part, in the first instance, exercised by federal courts and in the larger part by the state tribunals, so that the judicial system, the national judicial system, comprises both state courts and national courts. We are on record as saying that the court consists as much of the Bar as of the Bench. It seems logically to follow that the Chief Justice of the United States, therefore, is head not merely of the federal courts, but of all the courts, at the head not merely of the Bench, but of the Bar, and recognizing as he does the obligations of that headship and leadership, he has consented today to preside at this meeting of the conference of all the bar associations of the country, the American, the state and the local.

It gives me great pleasure to introduce as your chairman for this session the Chief Justice of the United States.

Chief Justice William Howard Taft:

Gentlemen of the Conference, a good chancellor amplifies his jurisdiction. My experience up to date in my present office is such that I do not need any amplification. However, my association in the cause of legal education was as dean of a law school

for three years; I have been professor for eight years; and this makes me feel that when I am called upon to speak for a cause like this that I should respond and ought not to be criticised for responding. We have critics not only of our opinions, but of our occasional utterances. Therefore we must take care that what we talk about shall be in the line of judicial propriety. I trust that a discussion of the need of legal education is not such an issue that either Congressmen or Senators can complain of my going into it.

The law is a learned profession. It requires close, accurate, constant study to master it and to make a man a good and helpful lawyer. Its field is very wide. It must apply to every phase of our many-sided life and society. As life and society grow more complicated, the law takes on that characteristic.

The source of the law is in statutes and in precedents. The statutes are without number and the precedents are myriad and are contained in thousands, yea tens of thousands of volumes. No man can know all the statutes or all the cases which make precedents in the unwritten law, and in the application of statutes. He can only study generally the principles as they are to be found in the leading cases and familiarize himself with the methods available for finding the detailed precedents especially applicable to the case in hand.

This calls for a good and a trained memory, great intellectual industry and facility, a power of analytical and synthetic reasoning, and very wide, general information of society and the practical affairs of men and government, adapting him to quick acquisition of knowledge, accurate and sufficiently detailed to enable him to advise those who seek his assistance, and to maintain or defend their rights in every walk, profession or business in our kaleidoscopic society.

It goes without saying that the best preparation for the successful study and practice of such a profession is a wide and thorough general education. The best general education is to be had at our colleges and universities. There one studies literature, language, mathematics, science, history, economics and government. There one is subject to daily, monthly, semi-yearly or yearly examinations of what he has studied. He is trained to arrange his mental machinery by special review and rapid

summary of the study of a considerable period to present it to his examiner in a comprehensive, accurate and logically digested form. He will not remember it all permanently but he will carry enough largely to widen his general information, and what is more important, he will by this constant practice in preparing for such a review and examination acquire a facility in the rapid acquisition and analytical digestion of any of the infinite variety of subjects he may have to be familiar with in advising a client or conducting a litigation for his rights. Such facility will often make the difference between his failure and his success. For no learned profession, therefore, is a thorough and general college education more necessary than for that of the law.

I am not saying that a man may not acquire such an education and preparation without having the benefit and opportunity of a collegiate or university course. There are geniuses in application, men of native intellectuality and ability and high ambition who can mount obstacles and fit themselves for anything to which their will would carry them. But they are rare exceptions. We have to deal, in laying down rules for the required preparation for a profession, with the average man who wishes to practice it, in order that society may be served in a most important capacity by competent practitioners. We should not be governed in laying down such rules by the needs or ambitions of those who would become lawyers. The safety of society, and their useful aid to society are the prime considerations. If a man cannot secure the preparation which an average man should have, to be a lawyer, then he should seek some other avenue of livelihood. We have all the lawyers we need now, and there is likely to be no dearth of them, however thorough the preparation insisted upon. The illustrations of the evil that may be done, by admitting to a learned profession of importance to the community one not properly prepared, are perhaps easier to find and elaborate in the case of physicians and surgeons than in that of the lawyers; but the evil though not as plain is just as great in the injury done to individuals and society.

But I am asked, would you shut out worthy young men so poor that they cannot go to college? Would you bar a man like Lincoln from the Bar because he had to fight his way from squalor and poverty to become the great lawyer he was? No, I

would not. Lincoln was a man, and so are all nascent geniuses and leaders like him, who if it had been necessary to go to a college to prepare himself for the Bar would have overcome another obstacle and done so. It was not necessary in his day to have the basis of a college education for admission to the Bar. He educated himself and prepared himself. He would have been better prepared, had he had a college education, but he was a rare mould and his example furnishes no rule which should guide us today. The opportunities for college education are not confined to the great eastern endowed universities, or to the great state universities, now flourishing in every state. The whole country is dotted with collegiate institutions of learning near to the home of every young man anxious to come to the Bar, with facilities for supporting himself through his college course if he has the courage and tenacity and self-restraint to avail himself of them. There are thousands of young men doing this now. Such a man will derive more from his college course than the young man who is supported in college by his parents. He will know what it costs in effort to secure such an education. He will value it his whole life long. He will have in its acquisition a discipline of character that will enable him in the race of life to distance his apparently more fortunate classmates who get remittances from home and regard more highly the diverting pleasures of a college course.

I do not know that I want to be personal, but that comes home to me with such force that I must illustrate it with an anecdote.

My father was the son of a farmer in that part of Vermont where how they live makes a man wonder when he goes to see those hillside farms. And he determined to get a college education, because he was going to be a lawyer. So he got some money by teaching at home. His teaching must have been pretty poor, but he was the head of the class, so he could be sure of questions that he asked. And with the accumulation of a little money he walked down from Vermont to the academy, to get his preparation, and then walked to Yale from Vermont. Then when he went in he worked hard, and he came out successful. And he worked his way through college. Now in his mind the value of education was so firmly embedded that his disgust at the use of the college for pleasure and for athletics was marked in his

whole view of the college life, and therefore when I went to college I had a gentleman at home that had an estimate of the benefit he was conferring on me by sending me there. He did not have much of a curriculum, but he got out of college life more than any man that I knew. And why? Because he got with it the discipline of character and the proper estimate of the value of education. Therefore the men who do accept the opportunities that are open to every young man to go through college and work himself through, while it is hard, they are receiving a training that will stand them in good stead in after life and make them as they become, the leaders, wherever they cast their lot.

But I must not dwell on this phase of preparation requirements for the Bar longer. I would not over-emphasize the side and claims of the applicant for the Bar. The great consideration is the usefulness to society of the Bar—as to that, there can be no doubt, that we shall greatly increase the competency of the Bar to discharge its most important function if we insist on the necessary preliminary essential of a thorough college education. In the new rules adopted by the American Bar Association, we have not made a complete college course necessary before study of the law begins, though I hope we may ultimately do so. We are moving in that direction by requiring two years of collegiate training.

Do not for a moment ascribe to me the conviction that a college education will fit all men who have it to become good lawyers. There are many who go through college who are no better prepared to begin the study of the law than men without a college education. They are men upon whom any higher education is wasted: I am sorry to say it, but if it were smallpox they would not run any risk of getting it. But we must be guided in adopting rules for a whole country by the average results of a requirement and not be driven from it by personal exception which would prevent making any rules at all, and open the profession to even greater abuses than now exist, great as they are.

There is nothing aristocratic or exclusive about our policy. When you come to employ a doctor to attend your very sick wife or child, you don't think yourself exclusive, you don't count yourself an aristocrat because you make diligent inquiry to obtain the



best doctor you can get. When you are seeking to recover just compensation for a gross injustice done you, or are defending yourself against a dangerous and fraudulent suit against yourself for heavy damages, or are seeking to save your property from total loss at the hands of some one whom you have unwisely trusted with it, you cannot be called a patrician, or a snob, or an aristocrat because you try to find a lawyer who is the ablest and best fitted man to preserve your rights at the Bar. The rules for preparation for the profession of the Bar were adopted for the purpose of making it more likely that you can find such a well-prepared lawyer, and making it less likely that you will hazard your important interests, important at least to you, by placing them in the hands of a man who practices law but who may not know enough to protect them as a competent lawyer would. It will not make certain that every lawyer is competent but it will certainly reduce the number of incompetents. We make haste slowly in this world in reforms. But it is important that we shall be constantly moving in the right direction.

The first topic for discussion is that of the justification of the proposed requirement of at least two years of college experience and training in view of the technical education necessary to make an efficient lawyer. I am asked to say that it is expected that the speakers will not consume much more than a quarter of an hour apiece. I have the pleasure of introducing Prof. Samuel Williston, of the Harvard Law School.

Samuel Williston, of Massachusetts:

There are more reasons than one which make it desirable that one who proposes to study law should have had at least two years of college experience and training in order that he shall obtain the grasp of legal theory and principle that is essential to a well-educated lawyer.

In the first place, two years of college training insures some degree of maturity in the student, and the effective study of law demands a mind of some maturity. The childish gift of memory is by no means to be despised, but the law student who relies entirely upon that is doomed to failure. Nor is pure logic, though vital in legal study, the only power of mind which a

student of the law should possess and exercise. Perhaps the highest mental faculty which a great lawyer ultimately acquires is wise judgment, based not only on memory and logical deduction, but on a wide range of comparisons and inferences too numerous and too subtle for complete classification. This faculty is of slow growth, but its development should be begun and carried forward while a student is engaged in mastering a knowledge of technical law, and the faculty is one which can be evolved and educated satisfactorily only in a student of somewhat mature years.

If years alone were requisite, this desideratum could be obtained by fixing an age limit for students entering upon legal studies; but years alone will not suffice, the years must have been spent in such a way as to fit the young man for the work which is before him. Law is a bookish profession, and it is inevitable that it should become more so. Illustrations of great lawyers of past generations who have achieved success with slender knowledge derived from books are misleading. The printed sources of Anglo-American law have been more than doubled in bulk in 30 or 40 years. There are more law reports in English printed since 1885 than were printed prior to that year from the beginning of English law reporting. The bulk of statute, moreover, is enormous. No lawyer can be efficient now who has not some ability to use books and extract from them quickly and accurately the principles which they state. The law student at the very beginning of his course, and throughout his course, must be plunged in the midst of books. It is not an adequate or sufficient technical education for him to learn brief summaries of the main topics of the law. He must be able to investigate the original sources and learn to do this easily and quickly. Only by previous considerable use of books is he likely to have facility in using them, and in extracting quickly from language frequently containing large words and involved sentences, an accurate conception of their meaning. The curriculum of the law school is already overcrowded and much time cannot be spent in training students in the capacity to look up references quickly and extract from them readily their meaning. I am assuming, it will be seen, that the student is to acquire his technical education in a law school. That this is now the only desirable way

need not here be argued; but I may say parenthetically, that a student who endeavors to prepare himself for the Bar without entering a law school has even greater need of preliminary general education.

In order to understand fully the importance of maturity and preliminary education before the work in a law school is undertaken, the character of that work should be understood. It is not what it was a generation ago. Students of the better law schools are not now given little elementary books from which to memorize formal rules. No great capacity beyond that of memory is necessary to learn that mutual assent and consideration are prerequisites to the formation of a simple contract. But we have learned how little the memorizing of such rules gives a student. The test of experience has shown that to get an adequate legal education a student must study cases—the source of most of the law. Not the capacity to state a principle in an approved memorized form, but the ability to apply the principle to actual facts is what constitutes a lawyer. As in natural science, so in law, dividing lines are shadowy. It is often as difficult to fix the precise boundary between legal right and legal wrong as that between the animal and the vegetable kingdom. Only by observing the applications made by the courts of the principles which they lay down can a student acquire an adequate idea of where dividing lines should be drawn.

The development of the case system of study and teaching has resulted in an enormous improvement in the capacity of graduates of the best law schools. It is often stated that a student on leaving the law school has but a small accumulation of knowledge of the law, which he will increase as the years go by in the practice of his profession. This is misleading. A third year law student in one of our better law schools, on graduation, knows more in the way of legal principle and theory than he will ever know again. This may make distinguished members of the profession smile; but if they will take a series of the examination papers which our students pass and look them over carefully, with a view to writing adequate answers, they will be likely to take my statement seriously. How many members of the Bar in good standing, with Bar examinations years behind them, would be willing to wager that they could pass now the Bar

examinations in a state where such examinations are as rigid as they are in many places—though nowhere are they as severe as in the law schools of the highest grade.

I must not be understood to make a broader statement than I intend. After admission to the Bar lawyers learn practice and procedure and methods of applying their legal knowledge most effectively. They also learn how the business affairs of life are conducted of which law students are not infrequently very ignorant. On certain topics in which they happen to become specialists they learn the law with a thoroughness and detail which no law student can equal; but for a broad conspectus of legal principle and theory, the law student on graduation almost invariably is, as I have said, at a higher mark than he is likely again to attain.

Now it is at best a hard test for beginners, to plunge them into the law reports and endeavor to make them extract from the decisions the meaning that is in them. If the work is well done the student must learn to extract this meaning himself, not merely be told what the professor thinks about it, with directions to memorize the professor's opinion. At the beginning the student will need much help in this work; as he proceeds he becomes more independent, but, at best, it is a severe intellectual exercise, and therefore, as I have said, a student should have considerable practice in using books and extracting the meaning from the written word before being subjected to it. This is merely saying the same of law books that might be said of any subject new to the student and couched in difficult and technical terms.

It may be asked—are not the law schools of which I speak going too far? Is it necessary for students to learn so much? It is necessary if the law and its practitioners are to be made even approximately as good as can be. It is increasingly necessary as the years go by, as law books multiply, as life and business methods become more complex and as it becomes increasingly impossible for original intuition to achieve valuable results unless accompanied by knowledge of what has been done in the past.

Besides the maturity and general intelligence in using books and language which may be expected from one who has had some college training, and which are less likely to be found when one has not had this advantage, the specific studies which are

taught in college have a distinct, though often indirect, bearing on the work which a lawyer is called upon to do. As rules of law are merely rules governing the life of a community, all knowledge relating to the life of the community is of indirect advantage to the lawyer. Rules of law should coincide with wise economic policy, and one who has no conception of economic policy is not a well-trained lawyer. This is more apparent in some branches of the law than in others—labor disputes, railway administration, restraint of monopolistic combinations, all involve fundamentally economic questions, and law must be brought into harmony with a wise economic solution of such questions. One who has had no college training is not likely to have an intelligent understanding of economic theory on which to base a study of the law governing such problems, and few indeed are those for whom the possibility of broad systematic study has not ended when they begin the actual practice of their profession. The study of history also furnishes a background enabling the student in his technical studies to grasp better the idea that legal principles are an evolution, that in varying degrees they are always influx and must be studied with reference to time, place, and circumstances, and adapted to them.

More important even than these special studies is the capacity to use the English language. To read it understandingly, to write it and speak it correctly and effectively. While it must be sadly admitted that college students are frequently defective in these respects, at least they are better than those who have not had college training.

It may be asked, are there not other and better ways to secure desired results than through an imposed rigid requirement of college training. On the whole, the answer must be, "No." It is not possible by examination to ascertain the student's proficiency with any degree of accuracy, and the element of time spent in studious pursuits is in itself of great importance.

It will be urged that though the preliminary training suggested may be desirable or, indeed, necessary for many or most students, some at least are perfectly able to undertake the study of law even under the strenuous conditions now existing in the best law schools, and to profit by it. It must be freely admitted that there are such young men. There is no doubt that high

native ability is even more important than preparatory training and that some students that have had no college education will surpass many who have had a full term at college. This does not dispose of the question, however. The question is not whether such brilliant young men can with some degree of success master the required legal studies, but rather will they be much the better for having had two years of college work; and in regard to this I think the answer should not be doubtful. For the very reason that their distinguished natural talent would enable them to do better than most of their companions, so they would derive from two years work in college greater benefits than other men. These brilliant youths are the very ones whose wings should not be clipped by permitting inadequate preparation. That their resolution to study law will be affected by a higher requirement than has prevailed in the past, is extremely unlikely. They will fulfill a new requirement as in the past they have fulfilled lesser requirements, and they will have permanent cause to be grateful to those who refuse to allow them to enter into a profession with inadequate training.

Moreover, rules must be judged by their general effect. Lawyers do not need to be told that the best rule may not work happily in every case and that effects must be considered as a whole.

This question is not wholly one of theorizing. There are many law schools in the country which have had experience which should enable their teachers to give opinions of value. A large proportion of the leading law schools of the United States now require a college degree, or at least two years of college education, as a prerequisite for admission. Thirty years ago not a single law school had this requirement. Very many teachers of law, therefore, have had pupils admitted without college training, and have subsequently had opportunity to observe the effect of requiring college work as a prerequisite to admission.

I am not in a position to give statistics, except with reference to the Harvard Law School, but I think I may say, without fear of contradiction from those who have had such experience as I speak of, that a number of men are eliminated who would better never have studied law because of their inferior mental equipment, and that the better class of students is improved by longer

preliminary education. As to the Harvard Law School, our secretary has prepared a brief table showing the results actually achieved by those in the school who had a college degree, and by those who had not. Practically none of the latter had any college training; but most of them had a high school education, and as a prerequisite to admission were required to pass an examination in Latin, French and Blackstone.

I should say further that in the Harvard Law School at the time of these figures 75 per cent was an honor mark attained by few and 50 per cent was required for a bare passing mark.

Comparison of the work of college graduates with non-graduates entering the Harvard Law School in the years 1892-1896:

Year	College graduates		Non-graduates	
	No. of graduates in first year class	Average grade	No. of non-graduates in first year class	Average grade
1892.....	89	67%	17	60%
1893.....	88	66%	18	58%
1894.....	97	64%	19	57%
1895.....	99	65%	38	54%
1896.....	138	65%	43	57%

Julius Henry Cohen, of New York:

Mr. Chairman, the Committee on Arrangements has not presented any rules for the government of the Conference. It was deemed desirable that there should be no rules. The Conference is a conference, and that means that there is to be a general discussion from the floor. But in view of the fact that the next two speakers are very brief, I would suggest, sir, on behalf of the committee, that we hear those two gentlemen before we proceed with the general discussion, and while I shall not offer any rule or any motion to that effect, I ask for unanimous consent that that be done.

Chairman Taft:

We will take that for granted. A good many years ago I presided at a dinner of Governors engaged in celebrating the Put-In Bay victory of Commander Perry. It was a protracted session, and at 3 o'clock in the morning the Governor of Indiana arose to read a very excellent paper on the question of international peace. Having read at some length, the audience at that time being in the condition that you suggest that the Supreme Court

may be in sometimes, that is, somnolent, he began his peroration with the remark "Am I dreaming?" and it woke the audience. Now I have the pleasure of introducing Governor Ralston, of Indiana, to speak on the subject before the house.

Samuel M. Ralston, of Indiana:

The Chief Justice told the truth in introducing me as far as he went. I actually talked my audience to sleep, but I promise you, unless you are very much exhausted at this time, that I will not have, I hope, the same effect upon you today.

I wish he might have gone a step further in introducing me, because I am known to only a few of this splendid audience. I think it would have been permissible for the Chief Justice to have told you that in my state I have been proved to be a man of good moral character.

The Constitution of Indiana provides that any man may be admitted to practice law who has a good moral character, and I have got mine.

The justification of requiring two years of college training in view of the technical education necessary to make an efficient lawyer has been ably maintained by the paper we have just heard. The speaker has long adorned the legal profession, and his services as a teacher and author have placed not only the legal profession, but our country, under obligations to him. Whatever he says on any subject is entitled to the most respectful consideration.

Neither the paper nor the subject it treats can be given a very full consideration in the few minutes allowed me. I have no doubt, however, that others will speak on the subject—some in favor of the position taken by the speaker and some against it, so that by the time the discussion closes, we will all have a fairly definite notion on which side of the line we desire to stand.

When I was invited to open this discussion, I recalled that the subject we are considering was before the American Bar Association at its last annual meeting, and upon consulting the report of that meeting, I was impressed that the last word had then been spoken, both for and against the proposition, namely, that before one should be permitted to take up the study of the law, he should have had two years college experience and training.



All will concede that the more liberally a boy is educated, before he begins the study of the law, the more easily he will master legal questions and become an efficient lawyer.

The question presented by the paper, however, is not whether a well rounded out education is a thing to be desired, before the study of the law is entered upon—that is conceded by all—but it is contended therein that two years college training shall be a prerequisite to entering upon the study of the law. In other words, the boy who has not had two years college training shall not be permitted to qualify himself for the legal profession, if the advocates of a two-year college course have their way, even though he has a better basis on which to build a legal training than has the chap with two years' experience in college to his credit.

Perhaps my statement is broader than the language of the paper, but I do not mean it to be. You have in mind the wording of the proposition we are considering, and you remember that in his first paragraph, the speaker informs us that "There are more reasons than one which make it desirable that one who proposes to study law should have at least two years of college experience and training." The implication from this is that if one, proposing to study law, has not had two years' college training, he should neither be permitted to enter a law school nor to take up the law as a profession.

A law school supported by private funds has the right, of course, to fix its own standard of admission for those desiring its advantages with the view of becoming lawyers, but I maintain that no institution, supported by public funds should say to an American boy that he cannot become a lawyer, unless he first wrestles for two years with a college curriculum.

I believe in colleges, and I endorse the wonderful work they are doing, but I am not willing that even a college shall bar a boy from becoming a lawyer who has not been fortunate enough to avail himself of collegiate training for two years.

There is much in this paper that I heartily endorse. I concede that college training will mature the judgment of a student, and sound judgment is essential to the lawyer. I concede that college experience will enable a student of the law to make better use of legal textbooks and law reports, and to become more

familiar with economic and social questions, and that these will add to his equipment as a lawyer. Certainly it is true, as the paper suggests, that a college education will be of great advantage to one who desires to be admitted to the Bar, but if he has not been fortunate enough to have been schooled in a college, is it right or wise to deny him admission to a law school or to the Bar, when he shows that he is mentally equipped for such admission? There is no rule of justice that will withhold from him the right of admission in either case, on the ground that he has not had two years' experience in college.

I would not leave the impression that I am indifferent as to whether a law student has had the helpful assistance of a law school or not. Law schools afford their students very great advantages and qualify them, as a rule, much better than a boy can be qualified for the law in a law office. In truth, I believe so strongly in the work of law schools, that I do not want to see them fix their standards so high that none but boys who enjoy liberal financial means, or who subject themselves to severe hardships, can hope to receive a law diploma.

It smacks of a tragedy to say to a worthy and ambitious youth that he has the ability to do the work of a law school, but that he cannot get a law school education because he has not had two years' training in college, or that he cannot qualify himself for the Bar for the same reason.

While I do not advocate a low standard of mental equipment and training for lawyers, and freely admit the probability of better service being rendered by attorneys of exceptional qualifications, I take the position that an arbitrary requirement of two years college training is not the proper solution and in many cases would result in unnecessary hardship.

Admission to the Bar is often perfunctory and signifies no particular preparation for the practice of the law. This is not as it should be. A standard for admission to the Bar, showing a liberal preparation to practice law, should be maintained by each of the states, but such a standard should be satisfied when it discloses the requisite ability for the practice of the law, without regard to how that ability was acquired.

The admission requirements should undoubtedly include a good elementary education, the knowledge of how to find the law,

and the ability to interpret correctly statements of legal principles and important decisions and statutes, and to know the basic principles of the common law. The ability to analyze, distinguish, and apply principles is also essential, but it does not necessarily follow that these prerequisites can be acquired only by first pursuing two years of collegiate work.

The requirements I suggest will meet the rule of fairness exacted by a sound Americanism, and will develop a class of lawyers sufficiently qualified to safeguard the rights of litigants and wisely to counsel those seeking legal advice with the hope that they may avoid being drawn into the courts. If lawyers can be brought to average up to the standard these requirements would establish, the legal profession would be able to discharge its duty to society and government.

And, after all, it is the man of average ability who is the salt of American citizenship. The average teacher in our schools makes the greatest contribution in character building. The average farmer, and not exceptionally superior farmers, feed the world, and it is to the average lawyer, in point of character and ability, to whom the people can look with the greatest confidence for the enactment of wholesome laws and the wise interpretation thereof. Any system of study or training that will produce this kind of a lawyer should have the approval of the legal profession.

Chairman Taft:

Now we will have the pleasure of hearing from another Governor, a gentleman who for some years was Governor of Missouri and for some years has been at Boulder, Colorado, a professor and lecturer at the law school of the university of that state.

Herbert S. Hadley, of Colorado:

Speaking from the standpoint of a teacher of the law, I am somewhat in the situation of my old friend Pearce, of Kansas City. He was once summoned on a jury and when the judge asked the panel if there were any reasons why any of them should be excused from service, Pearce said, "Yes, I have an excuse, your honor, I am a lawyer." The judge then said, "Well, Pearce, you are not enough of a lawyer to hurt anything, and so I will keep you on the panel."

So while on the particular subject of legal education, I fear I am not qualified to speak, on the broader aspect on which I have been asked to speak, so much has been said, and well said, that it seems almost the work of supererogation to undertake to add anything; but I do feel, and feel strongly, both from my experience of 25 years at the Bar, and as a public official dealing largely with lawyers during the limited time that it has been my good fortune to be connected with education, the necessity of preliminary college training to make a lawyer in the broadest and best sense of the word. But before turning to that phase of the proposition I want to emphasize what the Chief Justice has said as to the surplus of production of lawyers under our present system of legal education and admission to the Bar. I believe as I have read the literature of these discussions that that point has not been sufficiently emphasized.

Some years ago, as I recall it, the University of Michigan made an investigation as to the extent to which the graduates of that law school were pursuing the practice of law, and it was found that 10 years after graduation less than one graduate in five was then making his living by the practice of the law, and it would seem that there is no doubt that the statistics of that institution would apply to other institutions of the country. The conclusion is irresistible in my opinion that the quantity is exceeding the demand, and the quantity is increasing rapidly today without reference to the quality. It is also interesting to note that the increase in the number of law schools and the increase in the number of students in the law schools has gone forward in about the same proportion as the decrease in the medical schools and the decrease in attendance at medical schools since the medical profession began to put its house in order.

Now, while I do not mean to say that the study of the law, even for those who do not practice it, is without beneficial results, yet I do mean to say that we should maintain the law schools for the production of lawyers. But the question can, in my opinion, be placed on a much higher and more controlling theory than this; and that is on the theory of the welfare of our profession and the proper administration of justice in our courts.

It is stated by the Chief Justice in his excellent introduction that our profession is a learned one, and I suppose that the

Chief Justice has the last guess upon a question of that kind, as well as the last guess upon the question of what the law is. But I undertake to say—and I have made inquiries to settle in my own mind this question—that at the present time—and I speak particularly of the Central West, with which territory I am familiar—no presumption of learning or culture is indulged by the general public in favor of one simply because he is a lawyer. I might go further and say that no presumption is indulged in favor of one from the standpoint of moral character simply because he is a lawyer.

Upon last Sunday, when I left the City of Denver, I read in the newspaper a statement of the District Attorney of that city, a city of 300,000 people, to the effect that after a year and a half experience in the admitted enforcement of the criminal law he had found that the lawyers who represented the criminals were as criminally disposed as the men they were defending. I can speak from the standpoint of an experience of six years of trying to put men in the penitentiary, both through the trial and appellate courts, and four years' experience in letting them out of the penitentiary, in which I had to examine a great many records in criminal prosecution. I think I am entirely conservative when I say that I think in two-thirds of those cases in which I have had actual experience, I am certain that in a majority of them perjured testimony was offered in behalf of the defense. But the question does not relate only to the standing of our profession, the question concerns itself as to the effect of this condition upon the administration of justice, and, whether or not the opinions that I have expressed in reference to the profession are true, there can be no question of the public's dissatisfaction with the administration of justice in our courts.

Why, Mr. Chairman, we can easily recall the time 10 years ago when the paramount issue—and paramount issues, remember, at that time, were the questions in American life—the paramount issue in American politics was the relation or attitude of the American people towards their courts. That dissatisfaction found expression along two lines: First, for the failure of the courts to properly administer justice in ordinary civil and criminal cases, and, second, upon the ground that the courts by their reactionary positions in the decisions of ques-

tions involving social and industrial justice were defeating the will of the majority in the enactment of laws for the regulation of those questions. The dissatisfaction upon this latter ground became so pronounced that it constituted one of the leading causes for the organization of a great national party, and one of the foremost leaders of American thought and action, Theodore Roosevelt, a man who was correctly described by one of his French admirers as "The greatest voice of the Western World," advocated the submission of the decisions of judges upon such issues to review by popular vote. And the distinguished Chairman of today's meeting said in a public address that "the administration of criminal justice had practically broken down of its own weight, and that the administration of criminal law in all of the states of the union, with one or two exceptions, was a disgrace to our civilization."

I believe that it could be said that no statement by any public man in the last 50 years upon a non-political issue attracted such attention or has been so often quoted as this strong indictment of our judicial system by Chief Justice Taft.

Now, with that situation existing, the question arises has it improved since that time? Are the people, because they are not discussing much questions today, any better satisfied with their courts than they were 10 years ago? I believe they are not. The Great War, with its aftermath, has, of course, absorbed the attention of the American people; but that same inquisition of both our profession and the administration of justice is going to come again and we should be better prepared to present an answer to that question when it does arrive than we were prepared to present an answer to it ten years ago.

The statistics which cover the present situation of this country are likely in my judgment to make this dissatisfaction more pronounced than it was then, for from 1912 to 1918 there were more people murdered in this country than there were American soldiers killed in the World War.

Prosecutions in United States Courts increased from 9500 in 1912 to 70,000 in 1921, and in 1921 the property loss by reason of thefts from public transportation companies reached the immense sum of \$100,000,000.

Now the question is what is the remedy, what is the correction for those conditions—because our profession cannot escape responsibility for the administration of justice in our courts. Men who preside over the courts of this country are taken exclusively from the members of our profession. The active agencies who present the questions of law and of fact for adjudication by the courts are members of our profession. And, in the final analysis, we must answer and accept responsibility.

I do not mean to say, in suggesting that education is the remedy, that an educated man is always a good man or an able one, because I have known many men who spent a number of years at Harvard and never acquired anything except an accent, and I have known many men who attended Yale and Princeton without any result except to be able to smoke a pipe with distinction. And yet unless the whole theory of our government, unless the whole theory of our system of public education is wrong, the solution, and the only solution of this problem, is education and more education.

There is even yet a broader view than I have stated in reference to this question of higher educational standards for our profession. The theory of democracy, as James Bryce says in his very able discussion of the subject, "is that the right to vote will carry with it the will to vote, and that the will to vote should go hand in hand with the ability to understand the questions to be decided."

When Great Britain took her first step towards universal suffrage, Robert Lowe, one of the leaders in opposition, declared in Parliament, "Educate your masters." The justification of the expenditures in this country of more money by the state and local governments upon the support of education than in the support of any other, and in many cases than of all the other departments, of government, is that we must have an educated electorate; and to be educated, it is not sufficient, as Mark Twain said, to be able to sign your name without sticking out your tongue. An educated voter does not mean one with merely the ability to read and write. It means one with a mental development, capable of understanding and deciding public questions and voting upon them understandingly, and particularly is it necessary for the welfare of our country that the lawyers should be educated men in

the broadest and the best meaning of that term. All the members of one department of our government come from our profession; two-thirds of the executives of the states of the union, I believe, come from our profession, and if we have not furnished the majority of the members of the legislative bodies, both the National Legislative Body and the legislative bodies in the states, we have certainly furnished a larger number to such bodies than any other single profession or trade or occupation. In one sense the majority of the members of our profession constitute a governing class, and as De Tocqueville said, we constitute a counterpoise for democracy. If our system of jurisprudence was a set of arbitrary rules, if it was founded only on logic or philosophy, it might be properly mastered and practiced by uneducated men. But it is not. It is the product of the lives and hopes, the struggles and aspirations of those who have lived and wrought since civilization began. And what is true of the problems of the law is true of problems of government.

And therefore unless our very theory of government is wrong, unless our theory of public education is wrong, the need of higher standards for admission to the practice of the law is clearly evident.

Mr. Chairman, if I may trespass a moment, I want to say a word in conclusion in reference to the practical side of this question—because I believe it was Colonel Roosevelt who said to Harriman, on a historic occasion, "We are both practical men," and I trust in dealing with this problem we are all practical men.

This work of bringing about the raising of the standards for admission to the study of law and for admission to the practice of law I believe is peculiarly the work of the American Bar Association. I do not believe the members of this Association underestimate the difficulties that confront them. We will find in the Supreme Courts, where they deal with the question, mostly men who were educated under the old system of the inadequate law school or the law office. We will find in the legislatures the country lawyer whose legal and general education has not been extensive, and it will be a difficult proposition to secure the rules necessary for the accomplishment of the result. But the work of the medical profession in what they have accomplished in the correction of their conditions, the history of the last four amend-



ments to the Federal Constitution, and particularly the Eighteenth Amendment to the Federal Constitution, show what can be accomplished and how quickly by men who know what they want and are determined to secure it. In this work in my judgment we should heed the Scriptural admonition that no man having put his hand to the plow and turning back is fit for the Kingdom of God.

Chairman Taft:

The second topic is the effect of college experience and training in developing the desire and ability to understand and maintain high ideals of professional conduct. This is a topic to be introduced by Mr. Silas Strawn, of Illinois.

Silas Strawn, of Illinois:

For more than 30 years I have been actively engaged in the general practice of the law in the City of Chicago. During that entire period it has been a part of my duty, as well as my pleasure and privilege, to direct the work of an average number of 25 lawyers born and educated in different parts of the United States. They have had all of the different degrees of education, both preliminary and legal. There have been graduates from the great universities of this country and of England who have subsequently taken degrees from our principal law schools. There have been graduates of part-time law schools and of evening law schools, with and without the advantage of a preliminary training either in a college or a high school. There have been others who have graduated from part-time or night law schools after having had preliminary college experience. And there have been still others who have acquired their legal training in an office, without ever having attended a law school or a college.

I dislike exceedingly to detail my personal experience, but it has been suggested that the testimony of a witness is entitled to consideration only in so far as he is shown to have had an opportunity to know the facts about which he is called upon to testify. May I ask you, in what I shall have to say, to treat my remarks as purely impersonal, and to regard them only as the experience of an impartial observer of the subject under consideration.

That a college experience and training develops the desire and ability to maintain high ideals of professional conduct seems to me incontrovertible. If this conclusion is not sound, then it necessarily follows that all education and all systematic training and discipline is a failure.

A college education presupposes:

1. Advantageous environment.
2. Opportunity for systematic mental discipline.

Can there be any argument upon the proposition that a student in almost *any* college or university has not a tremendous advantage in the development of habits of application, concentration, industry, manliness, courage, frankness and, indeed, everything that goes to make for general culture, influence and power over him who is not surrounded by the daily atmosphere of college life? The college age is when the youthful mind is most formative and receptive.

Cardinal Newman well said:

"The practical business of a university is training good members of society. . . . College honor is the keenest in the community and no higher ideals can be found on earth than in the best thought of our best universities."

Therefore, it seems unnecessary to argue that a college affords an advantageous moral environment. Every one must admit that fact.

That the college or university affords an opportunity for better mental discipline is also an undeniable truth. However naturally able or industrious the student's mind may be, it must inevitably follow that the application of that mind in an orderly, systematic way *all* of the time will produce infinitely better results than will its application at *will* or but *part* of the time.

It has been my invariable experience that, given two minds of approximately equal inherent capacity, the college trained mind when brought to bear upon the solution of any problem requiring concentration and orderly thought will demonstrate greater efficiency than the mind without that training. It is also true that in the practice of the law the college trained mind manifests higher moral conceptions and a keener appreciation of the ideals of the profession.

Although to say it is trite, nevertheless too much emphasis cannot be laid upon the fact that the law is a learned profession.

Never in the history of the world have the requirements for the successful practice of the law been so exacting. With the constantly increasing complexity of our governmental machinery and the creation of bureaus and commissions to perform the various functions of the nation and the several states, the preparation of the lawyer of today to do the work required of him never ends.

To meet the requirements of the modern captain of industry (whom we lawyers must admit to be our source of supply), the lawyer must not only be more familiar with the general principles applicable to the business of the client than is the client himself, but, in addition, he must bring to the solution of the many problems with which he is daily confronted a broad, general knowledge of what is going on in business, political and financial affairs not only in our own country, but throughout the world.

The lawyer is frequently referred to by his client as the one who "keeps him out of jail." This does not necessarily mean the client is morally oblique and that the lawyer enables him to evade the letter of the law. It is because the lawyer has a broader vision and a better knowledge of the essential difference between right and wrong. It sometimes becomes his duty to impress upon the client that "honesty is the best commercial policy." I say *commercial* policy and thereby avoid the realm of controversy into which he might be precipitated if he dealt with relative morals.

No lawyer can expect to attain any considerable degree of success unless he commences his professional studies with the background of a faithfully pursued college course.

We hear the argument that the poor cannot afford to engage an expensive lawyer and that to supply this demand there must come to the Bar practitioners who have so small an amount invested in education that they can afford to sell their services cheaply. I submit this is a mistaken idea of helpfulness. Can any one deny that a cheap lawyer is an expensive luxury? Is it not frequently true that the so-called cheap lawyer charges more for his services than the capable one? There are two reasons for

this: (a) His experience and practice are so limited that he has no opportunity to acquire any sense of proportion as to the relative importance of the services performed by him, and (b) he has not developed the requisite moral conscience or ideal of professional conduct to overcome his inherent predatory desire to follow the advice of Mr. Means in the Hoosier School Master, "Git a plenty while you're gittin, I say to Mirandy."

The deplorable truth is that the poor generally pay more for less efficient legal service, rendered by incompetent lawyers, than the well-to-do pay for similar services rendered by lawyers of recognized ability and standing at the Bar.

The major portion of the vast amount of corrective work performed by the Chicago Bar Association consists in the restoration to unfortunates of money and property of which they have been robbed by unscrupulous lawyers who regard their license to practice their profession as a license to loot.

For two years it was my privilege to serve as a member of the Committee on Character and Fitness of candidates for admission to the Bar of the State of Illinois. During that time there came before our committee more than 400 applicants. Speaking generally, the weakness of the character and fitness of these applicants did not consist in their lack of technical knowledge requisite to pass their examinations. It was because they were lacking in the appreciation of the ethics of the profession and of the moral obligations which rests upon a member of the Bar. Many of them were imbued by a desire to take a short cut to a license because they craved the opportunity to prey upon clients. Others regarded admission to the Bar as a badge of honor without any appreciation of its attendant responsibilities.

It was our unvarying experience that the lack of ability to distinguish between right and wrong and the failure to realize the ideals of the profession were most prevalent among those who did not have a college training.

Therefore, while it may be admitted that there are exceptions to the rule, and that a college education with its advantageous environment and disciplinary opportunities does not always overcome an inherent moral obliquity, I submit there can be no supportable argument against the proposition that a college experience and training necessarily develops "the desire and the

ability to understand and maintain high ideals of professional conduct."

Chairman Taft:

The next subject for discussion is that of the economic conditions and educational opportunities in the United States which enable the ambitious boy of small means to obtain at least two years of college training. The topic will be introduced by James B. Angell, President of Yale University.

James B. Angell, of Connecticut:

The cost of professional education in the United States has in recent years been rapidly advancing. This fact reflects in part the general rise in the cost of commodities and of services of all kinds and in part the raising of standards for entrance into the professions. We have not as yet reached a state of equilibrium in either of these factors, and any statements which are made today will presumably be subject to substantial revision a decade hence. Nevertheless there are certain general tendencies discernible whose fiscal aspects can be evaluated with measurable certainty; and in response to the invitation of the officers of this Association, I shall attempt with some misgivings to discuss briefly the subject indicated by the title of my paper.

I understand the premise upon which the discussions of this paper are predicated is that applicants for admission to the Bar shall be graduates from a reputable law school, entrance to which requires at least two years of college training. Assuming that the average boy at present enters college at about 18, it would follow that under this program he would be 20 years of age before beginning the explicit study of the law, would be at least 23 upon graduation from the law school, which it is assumed would comply with the present three-year curriculum of the better schools. Men possessing real capacity and enjoying reasonable fortune in the securing of openings for practice might then perhaps expect within another two years to be fairly on their feet financially and to be no longer a charge upon their parents or guardians, nor under further obligation to support themselves by other than their professional work. How soon they can afford to marry and assume the costs of rearing a family is another matter, but

one whose social aspects are assuredly of prime consequence in this entire problem. It may be that, quite apart from the cost of the two additional years required for collegiate training under the program we are discussing, the mere extension of the time demanded would prove a critical element in the minds of many young men. Evidently scholarships and the like would have no bearing whatever upon this consideration. Possibly this factor may preserve to a useful trade some men who otherwise might attempt to adorn the Bar. It is a common saying at the present time that no intellectually competent lad, who enjoys moderate physical health, need be debarred from a collegiate education, if he is really eager to secure it. I think this statement is wholly inside the facts, although it perhaps suggests a smoother path than often lies before the impecunious boy, particularly if he does not enjoy the gift for making friendships and in general gaining the confidence and regard of these among whom he is thrown. All of us who have had extended experience in collegiate affairs can recall occasional boys who, coming to college literally without a cent, have managed not only to support themselves while in college, but to lay up something for the future and in the course of the process have given no external indication of lack of money, have apparently had their college work disturbed in the least possible measure by their money earning, and still less have exhibited any inability to share in the ordinary social and extra-curriculum activities which constitute those characteristic features of American college life most cherished by the undergraduate. On the other hand, we have seen many a lad struggling against adversity, often at considerable cost to his health, and still more often at the cost of certain of the real values of the education which he is attempting to secure, sometimes being obliged very greatly to extend the period of his training, to say nothing of the sacrifice of social relationships which he has been compelled to make in the process. On the other hand students who have to fight for an education gain certain moral and intellectual advantages whose value can hardly be over-estimated. I call attention to these considerations because, in the citation which I am about to enter upon of estimated costs for college training, it is quite essential that due allowance be made for the

very wide difference in the capacities of students to carry on academic study while engaged in gainful occupations.

It is doubtless well recognized that collegiate conditions vary at present very widely in different parts of the country, especially as regards these matters of cost. Throughout the east, in the older educational foundations, tuition fees are relatively high, as are also law school fees. On the other hand, throughout the regions where the state universities have been developed most extensively, collegiate tuition for residents of the state is often nominal and generally relatively low, although non-residents are almost invariably charged at a materially higher rate. Generally speaking also, the fees at part-time and evening law schools average probably somewhat less than at the full-time institutions. In considering the element of cost therefore, one must have due regard to these local and institutional differences.

I judge that one question in the minds of those who are advocating the general policy under discussion concerns the extent to which scholarships and loan funds may now be available for students who, desiring to enter upon the study of law, would find the cost of the training under the program suggested prohibitive. I shall in a moment present certain figures regarding tuition charges and scholarship funds, but I wish to make it clear at once that, despite the necessary incompleteness of these figures, there can be little question at all that the scholarships and financial aids at present available to law students are wholly insufficient substantially to affect the situation. In 1920, for example, of the six largest law schools, only one required more than high school preparation. Approximately 4000 students were in these five largest schools requiring no collegiate training, while less than 900 were in the institution which did make such demand. I have every reason to believe that, if the sum total of the students in these lower grade institutions be compared with those in institutions requiring at present two years of college discipline, the above ratio would not be greatly modified. The existing scholarships are in most of the colleges regarded as insufficient to meet the present needs and if there were added to the college population the thousands of law students now in schools requiring no collegiate work for entrance, those resources would be hopelessly inadequate; nor is there any assurance that under

competition the prospective law students would secure a share at all proportionate to their numbers. The complete insufficiency of present scholarship aid to care for any considerable part of these students now in the lower grade law schools is therefore certain.

There are some institutions in which men can secure two years of academic collegiate training by evening or late afternoon work, thus permitting them to use the larger part of the day for financially profitable occupation; these institutions are not many in number and are not widely distributed. Moreover, the added cost of the tuition for such additional years must in any case be counted in. Although any such prediction is precarious, I think it is highly probable that a considerable proportion of the men now in the lower grade schools would be excluded altogether from the study of the law, by discouragement, if by no other more compelling cause, were the two years of collegiate training made prerequisite. Whether from the social point of view, or from the professional point of view, such a result should be regarded as an unmitigated disaster, I do not venture to allege, though I suspect it would be mainly the weaklings who would be deterred and the Bar can perhaps do without such; but I am quite aware that to a large body of opinion it would be most unwholesome and at variance with our supposed traditions.

Doubtless had the writer of this paper found time for a more careful assembly of statistics, his figures regarding tuition charges and scholarship and loan funds could have been made substantially accurate. As it is these figures, taken from the college and university official publications, are believed to be entirely trustworthy as regards the general trends which they reflect, although they may well in particular instances be slightly inexact. On the other hand, it is extremely difficult to secure figures regarding the significant costs apart from tuition, for these rest upon all kinds of shifting and inaccessible conditions, not the least of the difficulties being the wide variations in individual adaptability and willingness to incur discomfort. Nevertheless it is at precisely this point that the larger part of the cost for the boy thrown on his own resources is inevitably located. Even in the case of the institutions with high tuition



these "cost of life" charges are sure to be considerably in excess of the other items.

Collegiate tuition for a normal amount of work costs per year: \$200 at Amherst, Cornell, Lehigh and Williams; \$240 at New York University; \$250 at Dartmouth, Harvard, Pennsylvania, Princeton and approximately this amount at Columbia; \$300 at Massachusetts Institute of Technology and Yale. Generally speaking tuition at the smaller New England and similar colleges averages somewhat less than these figures, but \$150 is about the lowest charge for institutions which would be generally regarded as belonging to the same academic group and some run above these figures. In the extreme west, Stanford University has a tuition charge of \$225; in the middle west, the University of Chicago a charge of \$180, and Washington University, St. Louis, \$200; in the south, Tulane University a charge of \$125; in the District of Columbia, Georgetown University \$150, and the Catholic University of America, \$200. These are all examples of institutions on private foundations and it must be understood that in many of them there are substantial accessory charges for library, gymnasium, laboratory, athletic and health department fees which cannot be conveniently summarized, but which aggregate in certain instances considerable sums.

Among the state universities, tuition charges vary very widely. At the University of Wisconsin, University of Missouri, University of Tennessee, University of Ohio, and a few others, tuition for residents of the state is free, although there are in sundry instances incidental fees of one kind and another which amount to something. For non-residents of the state there is in Wisconsin a charge of \$50 a semester, at Missouri \$10 a term, at Tennessee \$40 a term, and at Ohio State \$50 a semester. At Michigan the charge for residents of the state in the Department of Literature, Science and the Arts is \$80, for non-residents \$105. In Indiana the resident pays \$50 a year, the non-resident \$85. In the University of Washington the resident pays \$45 a year, the non-resident \$150. In the University of Illinois in the Arts Department students pay an incidental fee of \$15; University of Colorado, \$15 for residents, \$30 for non-residents; North Carolina \$20 a quarter; University of Virginia, residents no tuition,

a University fee of \$10, non-resident \$135 tuition, and \$40 University fee.

Summarizing certain of the outstanding features of the situation then, we may say that for the student who is a citizen in one of a few states where state universities are conducted with practically free tuition, the two-year collegiate preparation for law would involve little more than living expenses for this period. For students elsewhere the tuition charges will run from a little less than \$50 a year to \$300 a year, depending on the institution. How small are the chances for any given individual to secure scholarships to meet these charges has already been indicated and the cost of living has naturally to be added in.

In considering law school fees for the present purpose, it will be convenient to disregard the amount of collegiate work required for entrance, although no schools are here mentioned which do not demand at least two years of such work. But evidently the total cost to the student who goes to a law school like Harvard, where he must have completed a full collegiate course before entrance, will ordinarily involve two additional years of college fees over and above those required in schools, which like some of the state university law schools, require but the two years of college work. An analysis of the economic status of such a group of students as those in the Harvard Law School might well throw valuable light upon our problem, but the writer has had no access to such data and does not know how fully they may have been collected.

At the University of Pennsylvania the fee is \$250 a year; at Yale, Harvard, Columbia, Catholic University, \$200; at Chicago, \$195; at New York University, \$180; at Emory, \$160; at Cornell, Washington University, St. Louis, University of Cincinnati, \$150; Georgetown University, \$140; University of Virginia, \$135 plus \$40 incidental fee for both residents and non-residents, at Tulane, \$115; at Michigan, for residents \$105, for non-residents \$125; at the University of Tennessee \$100; University of Indiana, for residents \$65 a year, non-residents \$100 a year; Ohio State University, \$60; University of Colorado, \$60 for residents, \$90 for non-residents; University of Washington, \$45 for residents, \$150 for non-residents; University of Wisconsin free to residents,

for non-residents \$100 a year; University of California, \$75 to residents, non-resident \$200 a year.

Living expenses beyond tuition are estimated by college authorities at figures which vary somewhat, but on the whole show a disposition to average about three times the cost of tuition, running above this ratio where the tuitions are less than \$100 and running slightly below it where they are \$200 or more. As is well understood by all persons familiar with college conditions, such estimates are inevitably arbitrary and they probably tend to be scaled considerably below the median. Taken as a whole, the variation in tuition charges is probably no greater than the variation in the actual "cost of life" in the several communities involved, so that, measured in dollars and cents, the institutions with higher tuition charges carry with them for the average student correspondingly higher general living charges. This is, of course, in no literal sense true for every student, for in the great cities where living expenses are generally high a man can, if he will, live very economically. In no case do these estimates of necessary expenses run above \$1000 a year, but the average is undoubtedly well above \$500, and many students spend much more than the higher figure.

Taking law schools as a whole, the scholarships available, which carry either full tuition or a large part of this tuition, are relatively few in number. At one institution at which there is an average attendance of about 500, there are at present 13 scholarships averaging about \$240 apiece and the tuition charge is \$200. Some of the scholarships there pay less than tuition. At another institution where the average attendance is 450, there are at present some 30 scholarships carrying full tuition and half a dozen others carrying smaller amounts. For the other schools from which I have been able to secure information, the number and value of the scholarships is very much less and quite a number have no such facilities at all.

It is difficult to compile statistics of an expensive or precise character in connection with scholarships available for the two required years of college work postulated in this entire discussion, because there is nothing to prevent a student from completing this collegiate work in an institution other than that whose

law school he proposes to attend. Indeed this situation is very frequently represented. To gather the relevant data for all the American colleges is possible, but the task is tedious and the present writer felt no obligation to undertake it. The institutions which report the largest percentage of scholarships available to undergraduate students in no case reach one-fourth of the total student body and in most instances fall far below this. The money value in terms of full tuition probably in no case exceeds 10 per cent of the entire tuition charges for the student body. Accordingly while it is true that in some institutions there are considerable numbers of scholarships available for undergraduate students, and in three or four law schools an appreciable but much smaller number, the total of these forms of outright financial assistance is not very large considered either relatively or absolutely.

A few institutions have in recent years gone far to develop loan fund systems. The growth of these funds is in many institutions going on very rapidly and the system bids fair to do much to solve the problem of the impecunious student who is willing to obligate himself in this way, for many of the funds are so conducted as to bear interest and more than maintain themselves. It also goes without saying that every educational institution nowadays attempts to assist its students to find means for profitable employment, if they so desire. But the demands of the better professional schools are now so severe that it is very difficult for a student to carry the normal work of a full-time law school or medical school and still find either time or strength to earn money. Moreover the local opportunities for work are in many cases quite limited.

In connection with this entire problem, I think it would be a fatal mistake to fail to take cognizance of tendencies now rapidly developing which, if they be successful in reaching their goal, will result in the reduction by at least two full years of the time now required for the average student to secure the bachelor's degree. Although the practice varies somewhat in different parts of the country, the standard educational procedure of the present time may be fairly regarded as involving eight years of grammar school training, four years of high school or academy, and four

years of college. The distribution of the first 12 years is now undergoing some change in certain regions, where the junior high school movement is being developed, but the formulation offered is substantially correct for a large part of the country. Careful studies of the situation backed by experimental demonstration make it clear that one full year can, with no great difficulty at all, be gained in the grammar school and high school combined, and there is every reason to believe that another year can be gained between the high school and the college. It must not be supposed that such shortening of the period of work implies a cheapening of the quality of the product. Quite the contrary is, in point of fact, likely to be the case. The savings represent a reorganization of the curriculum designed to cut out needless duplication, to eliminate topics which contribute nothing essential to intellectual discipline or breadth of information, and, through the utilization of improved methods, to secure better results in less time. If these improvements be adopted, together with a practical revision of educational methods such as will permit students to travel at rates adjusted to their several capacities, there will certainly be no difficulty at all in the case of the abler half of the school classes in achieving such savings of time as I have mentioned. Indeed there is probably no reason why unusually able boys should not make much more rapid progress than even this program provides.

There is very considerable inertia to be overcome before this type of plan can be put in operation and there are appreciable influences, especially in the private preparatory schools, which are positively antagonistic, but it seems hardly conceivable that in the long run our people will be willing to allow American youth who are the beneficiaries of the most ambitious program of public education ever attempted, to fall behind the better trained students in England and the Continent by two full years or thereabouts as is now in general the case. In our older communities, and in our more venerable educational institutions, changes of this kind may be expected to come about somewhat slowly, for the whole social life of these institutions and particularly their frequently hypertrophied athletics are set up to cater to young men of the present average age or older, rather

than to younger boys. So much in this the case, that parents frequently withdraw precocious boys for a year or two in order that they may not, as the phrase goes, "enter college too young." All the statistical evidence, from the point of view of sheer intellectual accomplishment, indicates that the younger boys on the average do distinctly better work than their older mates, so that except from the point of view of these social and athletic interests, there could hardly be made out a good case for the present late entrance upon collegiate and professional work. In those strata of the community from which come the students now in the short-time law schools, in those which require only high school preparation and in those which give their work in the late afternoon and evening, there will undoubtedly be a warm welcome extended to any additional developments which, while improving the quality of the training given, succeed in cutting down by one or two years the time consumed in securing it. In the long run, therefore, it seems highly probable that students who desire thus to expedite their professional education may look forward to a curtailment of both the time and expense connected with at least two years of their general training. In the measure in which this may prove to be the case, the question of scholarships and financial aids will naturally assume a somewhat smaller importance. At present, however, it must be admitted that this movement at once to improve and abbreviate the pre-professional training has not proceeded so far as essentially to affect the general situation throughout the country.

In conclusion it should be repeated that all college and universities are earnestly striving to make it possible for the man of fine character and substantial ability to secure collegiate training no matter what his economic circumstances. But it would be fatuous to assume that they have as yet at all fully succeeded in solving this problem. At the moment they are certainly not in a position to assure material assistance either in the form of loans, scholarships or even opportunities to earn money, to any largely increased number of students. The strong, earnest student can always pull through, but the task is often far from easy.

Chairman Taft:

Gentlemen, you have heard the formal and prepared addresses and the subject is now open for discussion.

Harlan F. Stone, of New York:

Mr. Chairman: As I listened to that address by Dr. Angell, there was one suggestion in it that interested me very much, and that was the question raised as to the probable effect upon the membership of law schools if there was an increase of the standard so that men entering law schools would be required to have two years in college. I thought there was a suggestion, by implication at any rate, that it would cut down very much the number of students in the schools. I think in that connection that it is important for us to recall what the experience has been in those law schools of the country which have actually raised their standards to two years of college or more. While it might have been expected that the number of students attending those schools would have been cut down, I think I am correct in saying that the actual experience has been in every case where that has occurred that after a reasonable time within which the new standards are put into effect, the actual number of students attending those schools has increased. I have no doubt in my own mind, based upon observation that I have made, that while possibly the total number of students seeking the legal profession would not increase—I should hope not, in view of the character of a great many of the men who come from those schools and now seek admission to the Bar—my judgment would be that the schools promptly adopting that standard would have an actual increase in attendance within a reasonable time.

Then there was one other thought that occurred to me about the last address. That is the suggestion that a statistical investigation of the student body of the large schools requiring some college training would be worth while. Of course, I cannot speak about schools other than the one in which I am personally interested. We now have about 700 students in that school. I have no hesitation whatever in saying that the student body is a representative body. Its students are drawn from every class of society, perhaps if any one in our school has not a fair representation it is the idle rich, because after all that particular class

in the community is not attracted to the laborious work of a law school. But every other class in the community is represented. I think, too, that a more intimate study of the amount of scholarship aid available in that professional school would be of interest. In our own school we distributed \$12,000 in scholarship aid. That is sufficient to maintain 60 students and pay their tuition in full. Many of them, however, do not require to have their tuition paid in full, all that is needed is some assistance. Our actual experience has been that the scholarship fund and the additional amount of money which we are able to put in scholarship funds, that is money that is to be repaid at some convenient time, loan fund, has been sufficient to meet the needs of the men of slender resources. I should say fully one-third of our students maintain themselves fully or in part by summer occupation, tutoring during the year, and availing themselves of the scholarship aid and loan funds which are available while they are students.

Then there is one other suggestion and I have finished. I think it would be interesting, since statistics show that a very great percentage of the men who go to the colleges come from urban communities, to see how far the urban universities of the country afford opportunity for the student to get a liberal education equivalent to two years of college by attendance at night or late in the afternoon while he is engaged in gainful occupations. For instance, Columbia University has several thousand of such students. It is possible for a man, quite apart from the regular college work during the day, to secure complete college education by attending at night after he has had his day's occupation. So that I think all these things I have mentioned are very hopeful indications that if the time is not already here it very soon will be here when the man of real enterprise, the man who is really worth while, can easily fulfill these proposed requirements.

William B. Hale, of Illinois:

Mr. Chairman: We have prepared statistics in Illinois on two phases of this subject. We are interested there to find out how democratic the Bar is today in view of those who are coming to the Bar. We are preparing even much more elaborate statistics than these. The rest of the statistics, however, are not ready at this time. We will be able to show in the figures we are prepar-



ing how many coming to the Bar today have had college education and how many have had high school education and how they succeed in passing the Bar examination, and so forth.

I would like to read a few figures which are in response to a questionnaire which we sent to the last 1900 men and women who came to the Illinois Bar, that is, those who came in the last two years or a little more. Out of these 1900, 1064 replied, more or less, some replying to some questions and some to others. About a thousand therefore replied. Many went astray because of changed address.

Out of those who replied, 1064 in number, they were asked five questions, as to whether they were born in the United States, where their parents were born, whether they supported themselves in law school and supported others in law school. These are the statistics which I will now read to you.

Our of 1064 students, 942 were born in the United States, and 122 were themselves born abroad. Of the 1064, 602 of their fathers were born in the United States and 497 of their fathers were born abroad. That is to say, 45 per cent of the men who have come to the Bar of Illinois in the last two years have been descendants of parents who were born abroad. One thousand and eighty-three replied to the question of whether they wholly supported themselves while they studied law. Of these 644 wholly supported themselves while they studied law. That is 60 per cent earned their own living while they studied law. Twenty-six per cent partially supported themselves while they studied law, that is, 86 per cent of all those who have come to the Bar of Illinois in the last two years have either wholly or partially supported themselves during their law course. Only 14 per cent not at all. Seventeen per cent wholly supported someone besides themselves at the same time that they were studying law.

We will continue these statistical studies further in Illinois for the education of our Bar, but I am inclined to think that the figures which we already have show that our basis is today sufficiently democratic, and that we do not need to be afraid that the young man from foreign countries and those from our own land who have not had sufficient education will cease to force

themselves to the Bar, because that is what they are doing today, rather than be called to the Bar.

Julius Henry Cohen, of New York:

While the words of President Angell are still ringing in our ears, there is one set of data or information that I think ought to be brought home to the Conference.

It so chances that I have been the Chairman of the Committee on Unlawful Practice of the Law of the New York Country Lawyers' Association for some years. That committee functions in the direction of eliminating persons and corporations who are not authorized to practice law. Now we have had to meet the popular criticism that has come from such a movement. The popular criticism is that we are seeking to maintain a monopoly of the practice of law. We have met that criticism by pointing out that the legal profession was exclusively privileged to give legal advice and to represent the people in court because of the necessity for protecting the community. In that connection it is interesting to observe that the head of the Regents of the New York University, Chester Reid, the other day said that a man can walk into a dentist's in New York today with a reasonable certainty that the education of the dentist is not being acquired by the operation upon his jaw. Today dentists must get an education before they can treat your teeth. The community does not realize that lawyers prosper more through the malpractices of the ignorant than they do through the sound legal advice that is given by competent men. Just as surgeons have more business when there are dentists who operate upon teeth who do not understand their job. We know, though the public does not realize it, that it takes some skill to draw a legal document and to draw a will, and yet we have such distinguished writers as Graham Wallace and Mr. Wells suggesting that the lawyers are at fault because they have not prepared forms that any person can fill in and thus economize rather than require laymen to go to a lawyer. Now we have succeeded in convincing the public, I think of New York County at least, and possibly the state, that it requires training and skill and knowledge to draw a legal instrument. And so when we prosecute notaries public we have the support of the labor department of the state and of those who

are interested in protecting the foreign born. But we have a much more difficult job when we start with the corporations, with the title companies and the trust companies. No less a distinguished writer than Dr. Frank Crane the other day in an editorial advertised the trust companies without compensation by saying that there are so many incompetent lawyers drawing wills and so many bad wills drawn that laymen generally now prefer to go to the trust companies to have their wills drawn. Now that has its moral at this time in our consideration of this problem, and that moral is the one suggested in the very apt phrase of Dr. Angell, that when you are driving the devil out of one door you had better look after the other doors. We say to the public that the trust companies ought not to be permitted to draw wills, that the attorneys for the trustee are not competent from a moral point of view to represent the donor of the property. We say that each party having an interest in that will must be specially represented and advised, and that therefore the employee of the trust company, in occupying that fiduciary relationship to the donor of the property, cannot carry out the obligations of the lawyers. But what shall we say then to the public when it appears that there are incompetent lawyers and that the license to practice law is no guarantee of that efficiency and skill which we say is requisite for the protection of the community, and that therefore unlicensed practitioners should be sent to jail? What shall we say of our responsibility when we undertake to close the door to the devils who are practicing as representatives of title companies and trust companies and the little devils on the East Side who are notaries public, and let in all these devils who are incompetent to advise the poor and who are drawing instruments that make more litigation for those who know how to handle litigation? In other words, gentlemen, it cannot go on with your protest to the community against the unlawful practice of the law, against the unlawful practitioner of the law, without at the same time performing the duty of the Bar to see that those who are licensed are competent to take care of the community. In other words, if you are driving the devil out of one door because you say he has no right to give advice and that he has not had a license to give advice, then you must not

let in at the other door the fellow who has the license but who is sometimes less competent to give advice.

Hampton L. Carson, of Pennsylvania:

The whole philosophy of the matter seems to be summed up in a case which occurred in the sixth century. I came across this case in studying the legal relations of the surgeon. It is a case which occurred in the sixth century, and it seems to me that the judge who sat in the trial of that case administered the most practical remedy for an evil which could be suggested. Recollection of the case came to my mind by virtue of Mr. Cohen's reference to the dentists. It happened that a man with an aching tooth went to a veterinary who was half barber and half blacksmith, and in the extraction of the tooth the defendant broke the plaintiff's jaw, and when the case came for trial, the trial judge non-suited the plaintiff on the ground of contributory negligence, that the plaintiff must have been an ass to have employed such a man for such a purpose.

John Lowell, of Massachusetts:

Mr. Chairman, having been treasurer of the Harvard Loan Fund for 25 years, although I cannot go back quite to the Sixth Century, I am convinced that at Harvard at any rate we can help the poor students in their efforts to obtain a two years' college course. We have administered that fund with success at Harvard, and I feel sure that the same thing applies with reference to many other colleges. I may have something to say later on the general subject, but I want to simply make the point that at Harvard we can help the poor deserving boy to secure two years' training at college.

Thomas J. O'Donnell, of Colorado:

Mr. Chairman, if I read correctly the remarks of the Chief Justice, he said it did not make any difference what the result of the law school was as to whether justice or injustice was arrived at provided the man had a hearing, and he said further that all that was necessary in order to get in court and stay in court was to write a letter to the judge. Now I should like to ask, in view of that remark, which of course we must accept as *ex cathedra*,

why any higher qualification in a member of the Bar should be necessary than the ability to read and write.

Chairman Taft:

They said in Westminster before they had reports, when a man cited a case it was always on all fours with the case at Bar. I should like to refer to the report or have profert of the speech before I could admit the statement.

John Bell Keeble, of Tennessee:

*Mr. Chairman and gentlemen:* I do not come from a state where they seem to have as many wicked lawyers as evidently they have in New York, if we believe and accept at their face value the statements made today. At the same time I come from a state with which the Chairman is more or less familiar and which has a rather enviable reputation on the circuit; I come from the state that contributed three justices to your court, Mr. Chairman, in the last 60 or 70 years. Now I think we are getting away from what seems to me to be the crucial question in these resolutions.

There is not any lawyer active today who claims any sort of position in the community that would not say that the Bar could be elevated and should be elevated. There is not a lawyer, I take it, who would not be inclined to admit, even if he lived in a rural community, that if he had two years of college training he probably would have been a wiser and abler lawyer, notwithstanding the fact that my observation of college life today is that it very frequently mars as well as often makes a man, but that is not the practical proposition. Governor Hadley referred to the statement that Mr. Harriman made to Mr. Roosevelt, "We are practical men." Now, let us look at this question we have to act upon here. You have all settled it so far as the American Bar Association is concerned. Then you ask us who come from Tennessee and other states in the union to pledge our support to go back and ask the legislature to pass a law which says that no man shall be admitted to the Bar unless he has graduated at a law school that has a three-year course and a requirement for two years in academic work, notwithstanding the fact that such a rule would disqualify every member of the Supreme Court of the United States, every member of the Supreme Court of the

State of Tennessee, and practically 90 per cent of the American Bar Association.

Now to go before the Tennessee legislature, which is just as fair in average intelligence and ability as legislatures generally throughout this country, and urge the adoption of a statute like that, would be simply folly. The state of Tennessee is not going to pass any such legislation as that, and I take it that there are many states in the United States that are not going to pass any such legislation as that.

Now I say the trouble with this attitude is instead of stimulating and guiding and persuading men to gradually attain the standards of the Bar they should attain, you place a Bar sinister upon every state that does not follow this signal.

It is a practical question. Even if we thought it were right it could not be done. Not only that, but if we asked the state legislature afterwards, if we said to them, well, if you won't do that, then do this, we would be in the position of having lost influence with them, and it would set the cause of legal education in our section backward instead of forward.

Now it is useless to say that a college should have this requirement for admission. I am prepared to say that those colleges that draw their students from sections of the country that can stand that kind of a requirement ought to have it, but when you come to a section of the country where colleges that have sought to elevate the standard of legal education and have required certain education, have set certain standards, for instance have in some cases required one year's academic work, to endeavor now to carry out this plan of two years' requirements, I say would be useless.

But you say that if the college cannot get that type of man it ought to close its law school. Suppose it did. It would drive that student body not to Harvard, not to Yale, but it would drive them to the night school and the one year schools and the schools that give inferior instruction, and the young men, instead of getting as good as they can in that situation, would be driven somewhere else. They would not come east or go west or enter the institutions that they could find with those standards. Only a few years ago a one year course was regarded as a very good standard everywhere. We cannot go back to the legislature, then.

with this demand, as I say. Let the law schools that can elevate their standard, elevate it just a little bit above their people all the time, just a little bit higher, but never so high that it cannot be reached in the rack by the average man of character and capacity. I will say this, that I could not honestly say that no man should be admitted to practice law in the State of Tennessee, anywhere in the State of Tennessee, unless he had two years of academic work and three years of law work, because I know that in 50 per cent at least of the county seats in my state the practice there does not call for any such learning or attainments, and if a man had that much education, there is not one man out of a hundred that would ever go back and live with father and mother and practice law with the boys among whom he was reared. He would go to the city.

And I want to say this, that I can go out in the mountain sections of the State of Tennessee today and you won't find any law cases there except hog cases and ejectment cases, but I can find a lawyer there who can try an ejectment case according to Tennessee law, who can run off of his feet any of the distinguished lawyers we have heard speak here this morning, not even excepting the distinguished nestor of the American Bar.

To go back to Tennessee, to the legislature there, and say that in order to practice law, in order to try an ejectment case, a man had to have two years academic work and three years law work in college, why, they would think I had lost my mind, and they would have a right to think so.

I do not wish to be misunderstood about this question of legal education. I have been an active college professor myself about 20 years in connection with the law school, and I have had to make a living practicing law on the side. At Vanderbilt University we have made a good strong fight to elevate the standards for admission to the Bar and the curriculum and the requirements for graduation, and we are keeping it up, and I believe in it; but I do say this: that I cannot look back upon the history of the Bar of my own state and honestly say that the only road to achievement and position at the Bar must be two years of academic work at some diploma concern and three years in some law school.

I know that Tennessee has given its fair proportion of great lawyers, and it is true today that the average lawyer at the Bar

at Nashville, where I live, the average of college men is far greater than it was when I came to the Bar; but I regret to say, when I consider the fact, that to be a successful lawyer requires not only attainments, but something else, not only character but something else. For the practice of law is an art as well as a science, and no man ever becomes a great lawyer until he has learned it in the school of experience—you cannot learn to try cases anywhere except by trying them. When I look back at members of the Bar of Cincinnati who practiced many, many times before you, Mr. Chairman, when you were on that Bench—such men as Edward Baxter and men of his stamp—we must remember that not one of them had a year's experience in any college or law school; and when I know that there is no man at the Bar today who could hold his own with any one of those men before trial or appellate courts of the state, I cannot say to the young men of Tennessee: This is the only road now for you to get to the Bar, because I know it is not.

We do not suffer much from lack of character among our lawyers, except among our educated lawyers. The Bar has lost the confidence of the people in many ways, but the educated members of the Bar have contributed their part toward losing the confidence of the public. Down in my country the great reason why the Bar does not exercise the same influence in public affairs that it used to do is because too often many of us—and I put myself in that class because I am subject to that criticism—have been retained for many years by large corporate interests, and whether because we feel embarrassed to express ourselves or fear it might react upon our clients, or whether we are embarrassed because we fear our sincerity might be questioned, we have lost our hold on the imagination of the public, not because we do not know law, but because we have withdrawn ourselves from that active touch with the community that those great lights of the law of ancient days had, men who took no regular retainer from anyone, but who were ready as free lances to serve any clients. Down in our part of the country the people have lost confidence in most of the lawyers, and in fact I have heard it whispered that that same situation is more or less true in the City of New York.



I. Maurice Wormser, of New York:

Mr. Chairman: My friend's oratory I cannot equal, but my friend's argument can be readily answered. My friend says that in Tennessee educated lawyers are the crooked ones. If so, it would logically follow that all education in Tennessee should be abolished. Evidently the laws of nature there are different from what they are in other parts of the country. But I do not believe my friend's statement that only the educated lawyers in Tennessee are the crooked ones is accurate. In New York State, and more particularly in New York City, our experience has been exactly the reverse. I can lay claim to being familiar with the recent records of the New York courts. My cross in life is to have to read these records, and the records of our appellate divisions show almost with uniformity that it is the uneducated, the illiterate, and, more particularly, the immigrant lawyer, the lawyer from a foreign country or son of parents from a foreign country, with whom we have difficulty. I teach in a law school in New York City which does not require either a college degree or two years of college for entrance, but I am absolutely convinced from my experience there—and I think it would be voicing the sentiment of practically our entire faculty—that the standard would unquestionably be raised, the men who graduate would be better, and the Bar in general would be elevated if these requirements were put through.

You must remember one thing from a practical standpoint. Let us be practical here and not talk ideals. There are some schools which require less than the standard which ought to exist. The standard which ought to exist, with the greatest respect, I think goes considerably beyond these proposed requirements. With education as it is today, with the doors open so that I, although my mother was a widow with hardly a dollar to her name, due to family misfortunes, could go through Columbia College and go through Columbia Law School and have my three square meals every day—and I do not lay claim to being other than the average; if we can do that, if the doors of education are open to us today, is it not the most stupid, the most foolish, the most assinine thing in the world to say that we are going to require that which every one of us knows is

the correct and the proper requirement, a college education today for the study of the law?

Now, gentlemen, if Abraham Lincoln were alive today—and I taught three years within a few miles of where Lincoln lived, and any of the people living there now who knew Lincoln could confirm this—if Lincoln were living today he would have a college education. You can bet your life on that, that Lincoln today would have had a college education. He would have realized its value, he would have known its worth. The poor man can get an education today if he has the ambition, if he has the desire for it, if he has the perseverance to get it.

Coming back to my theme, some schools require less than what ought to be the standard of college education. It ought to be a full college course. That is where we are coming to ultimately. This two-year proposition, with the greatest respect, is only a sop. If we are to have an intellectual aristocracy in this country—and the Bar, I say, should be that aristocracy in this country—there ought to be an intellectual aristocracy in every country—then we must require a college education as a prerequisite for admission to the practice of the law. If some schools do not require what ought to be required, we must raise those requirements by compelling them to meet the standards. If we do not compel them to meet the standard, if only one school has a standard lower than what should be required, a certain class of students will flock to that school, and that school will have to turn away students. I could cite an illustration off hand, but I do not want to go into individualities or personalities. Not long ago the Columbia Law School, the best and greatest law school in New York, was suffering from a complication which it should not have met with. It was unreasonable to expect it to require the standard it otherwise would have required by reason of the fact of the low standard of a certain competitor. Now, then, how are we going to raise the standard? We can raise our standards only in one way, by having our legislature pass an act that two years at college shall be required for admission to the study of the law.

I would like to see it go beyond that, but at the present moment I fear it is not an opportune time. We must do that. Unless we do it the Bar is going to be swamped. We have to be

saved from ourselves. The situation in the great cities is intolerable. My friend, with great sincerity, and with undoubted personal conviction, for which I have the greatest respect, spoke of the situation in his state. But that does not represent the United States. We must look out for New York, we must look out for Boston, for Chicago, for Philadelphia. Those are the places where the great amount of law practice is carried on, and those are the places where we must raise the standard of the Bar. Otherwise, gentlemen, our profession is going to be discredited.

I have the good fortune, and some times I feel the misfortune, of editing the New York Law Journal. Those of you who know what that means will realize what I have to go through. I have to go through briefs of counsel, I have to read notes from lawyers, I have to read through their arguments, I have to see really what they do day after day. It is a position in many ways that calls for an amount of labor and toil that no one man ought to have to do. Gentlemen, it is my sincere conviction and belief, and speaking as man to man, that we have to raise the standards, and unless we raise the standards in New York—I am going to speak plainly—the Bar is going to go to hell.

Mr. Justice Benedict, of Brooklyn, a man of the widest experience, and of the highest culture, a demagogue if there ever was one, used much stronger language to me last Saturday night, and it was so strong that I do not like to repeat it in this room, and he is not a college graduate.

Now, that argument cannot be met. There is no answer.

One word in conclusion. I believe if we put in the two-year requirement, we should do one thing which nobody here today has mentioned, and which, with great respect for the committee, I believe is absolutely necessary. I think that the two-year requirement should specify certain subjects, among others, first and foremost, rhetoric. Let us have men able to read, write and talk the English language—not Bohemian, not Gaelic, not Yiddish, but English. That is the first and foremost requirement. Second, a study of English and American history, more particularly English constitutional history and American constitutional history. How absurd it is, gentlemen, to let men study the law without a knowledge of Magna Charta, without a knowl-

edge of the Bill of Rights, without a knowledge in this country of the decisions of Marshall. Is it not ridiculous to permit men to enter law schools and to talk about the case of Dartmouth College versus Woodward, for example, without a knowledge of the constitutional history upon which that decision was founded? There are students who talk about that case and do not know that there was a Federalist party. That is exactly what I met with last Tuesday night at my law school. The student had never heard of the Federalist party, he did not even know what it stood for, he did not know that the whole Dartmouth College case grew out of the Federalist party quarrel in New Hampshire. Now that is serious.

A third thing we should require is a knowledge of logic. It is ridiculous to permit a boy to study law who does not know the difference between a major premise and a minor premise, who has never heard of a syllogism. Are we going to permit such men to make our laws for us? Could there be anything more ridiculous or anything more absurd than that? If so, I have never heard of it.

One last requirement—and on this I expect to hear some opposition and plenty of criticism. I am still a believer in the classics to this extent. I do not think any man should be allowed to study law who does not know what *reductio ad absurdum* means and who has not the slightest knowledge of the difference between a Latin term and a Russian or Italian or Bohemian term.

I am going to illustrate that. The other day I said to a student in one of my classes, in connection with a case of incorporation, that one corporation was the *alter ego* of the other. He said he did not know what that meant, he wore a look of bewilderment and wonder. I said "Did you ever hear of the two Dolly sisters?" Oh, yes, oh, yes, he had heard of them. I find they are all familiar with such modern references, especially if they have to do with ladies singing in a cabaret. I said to him "I have heard and understand on information and belief that they look alike. That is the explanation of *alter ego*. Or, in other words," I said, "it is just like Goldberg's two gentlemen in his cartoon, Ike and Mike, they look alike."

Now, is not that humiliating, that a law professor should have to make an explanation like that?

I am not talking for amusement, I am talking to try to get you to help me. Here is a poor, long suffering, overworked law teacher who asks you to give him as a teacher and as practicing lawyer that alone which can be of help. Please raise the standard. If the standard is not raised by us, the profession of the law in this country will become a mockery and a disgrace, instead of being what it should be, a beacon, as Mathew Arnold said, of sweetness and of light, instead of being a profession which will represent the aristocracy of this land.

Thomas Dawson, of Maryland:

I had not thought to enter into this discussion, but when the democracy, the fundamental form of this government is in doubt and has to be changed by the Bar Association of America, it strikes me we ought to take some notice.

Now to the subject. I fully agree with the effort and the purpose of the effort of this Association in raising the standard of the membership of the Bar. It cannot be too high. Let the examinations of the student and the preparation of the student for the Bar, his knowledge of the law, be as searching as it may, but when you come to set an arbitrary standard of mere educational qualifications there is some doubt in my mind that should give us pause. I say this because that may work both ways. Much has been said here, and aptly said, about the fundamental requirement of absolute integrity and unassailable good character in the members of the Bar who are to be trusted in absolute confidence with the life and liberty, the rights and the property, of their clients. I tell you, sir, the trust is enormous, and the qualifications of that man should be beyond peradventure. But will a mere educational qualification solve that or even aid that proposition? Suppose a man is bad and has a bad character and gets to the Bar. Why, the more education he has the more dangerous he is. Do you get anywhere on that?

Now, then, if that examination, if your requirements of his knowledge of the law are searching and complete, you must assume some things, you must know that that man in meeting those qualifications has some education, and I submit sufficient educa-

tion, it does not matter and it ought not to concern this great institution where or how he got that education, that qualification.

Now, another thing. I think there is something un-American in this movement, though not so intended, of course, and I do not draw the deduction from what has just been said about the establishment of an aristocracy. I, sir, like the rest of you am an American. I love the American institutions, and one of the most potent American institutions is the self-made man. I would warn you, then, to go slowly when you set an arbitrary standard that would proscribe his field of action and usefulness.

There is another American institution, that is, the American poor boy, with large natural endowments. Do not shut the gates of opportunity to such a man. Now, sir, the self-made man in America is an American product, and he is the man that has made this country what it is. Eliminate from American history the work of the self-made man and that history would not be worth the paper it is written on or the time that it would take to read it. You know, sir, and I know, men who have no college equipment who are going forward in the world's work, who are doing things, accomplishing things, and plenty of them have from one to half a boat load of college graduates in their employ, and glad of the job, and they themselves never saw the inside of a college. You and I have seen along the highway of life, the most dismal wrecks and failures, whose pockets, if you delved deep enough into them, would show not only a two years' college certificate, but a full course and a diploma. But is that any guarantee? I submit it is not.

Come out to the door for a moment and look across the Mall to that beautiful pile of chiseled granite raising its head to the sky, almost to the clouds, commemorating the life work and history, the contribution to history, of the greatest hero the world ever produced and the greatest benefactor of mankind, the Father of his Country. When he took in surrender the sword from the red-coated Britisher, did he flaunt in his face a two year certificate or a full course certificate of college education, that that life work of his might be done? Walk with me a little further, to the end of the Mall, and look at that beautiful tribute there about to be dedicated to the memory of the immortal

Lincoln. Had he as much even as a two weeks' certificate of attendance in a public school to his credit?

Now, sir, in your profession and your position in life I know you fully appreciate that great God-given paper, the Constitution of the United States. But what has made that of such efficacy and what has made it a world chart and guide more than anything else than the interpretation given to it by John Marshall? Whoever heard of John Marshall putting his nose inside of a college, or, for that matter, having a three weeks' course at school?

If Lincoln were living, it has been said, he would have had his college education, and you, I think, Mr. Chairman, in the best spirit and purpose, said Lincoln would have had his college preparation; but you know the old adage, that the last straw breaks the camel's back. Had Lincoln been told, you must have two years, young man, in some college, miles and miles away, or you cannot be a lawyer, then the life work and contribution to history of Mr. Lincoln would not be our heritage today and this would not be the great country that it is.

I submit, sir, that without the work of Lincoln, without the work of Washington, you would not be sitting in free America, that without Washington's work, done without a college training, there would be a red-coat back of you, perhaps, taking taxes out of your pocket.

Now, sir, I do not know that I am called upon to say anything about the outlying districts. There are plenty of representatives here from those districts. This country is not one whit better today than it was when Washington put it on the map and the proportion of colleges to the population of the country is perhaps about the same. I have no statistics on that. I know we have grown greatly in population, but still there are outlying districts where the poor American boy of great endowments is yearning for a fair chance to do what his forebears did. Is this America? Is it a free country, and has every man a fair chance? If he has, for heaven's sake do not put an arbitrary requirement of this nature on him, when the only effect of it might be to proscribe his opportunities.

I therefore, Mr. Chairman, have no speech to make, but I want to raise my voice in modest protest against the passage of an

arbitrary standard that would shut the gates of opportunity on the poor boy who has great natural endowments, proscribe the usefulness and field of a self-made man, and by the same standard keep John Marshall off the Bench and Abraham Lincoln from the Bar.

J. Nelson Frierson, of South Carolina.

Mr. Chairman: I represent both the State Bar Association as a practicing attorney and the Law School of the University of South Carolina. The State of South Carolina over one hundred years ago required men to study law three years. Just because of the vicissitudes in the history of that state 12 years ago they did not require them to study law for any length of time, and only in 1910 did we succeed in passing a statute requiring them to study law for two years. Now, Mr. Chairman, we have in that state as fine a body of young men, native Americans, as can be found in any state of the union. We are not troubled with the problem of having a foreign element to deal with, as is New York and some other states. While we have a fine body of native young Americans, we are as poor in physical resources as any part of this country. It is difficult for many of our finest young men to get through with their law course. One of the finest young men in my law school last year, a most brilliant fellow, in order to get through, had to work as night clerk, and going to lectures without having had sufficient sleep, and in spite of that handicap he was a double star man in his class. It does not seem to me that there is any logic whatever in this argument about the poor boy being shut out. It seems to me that the argument that rights of the individual are superior to rights of society today is not entitled to any notice whatever. Society is entitled to be protected against the inefficient and incompetent lawyer. I think the conditions in South Carolina are not much different from what they are in Tennessee. I know that the boll weevil has been eating up everything down there, they say it even eats up the Ford cars over night. Yet in spite of that last year we opened up a three-year course in law, after all these years of waiting. Knowing the financial conditions existing, we felt sure that the combination would cut down the numbers that would come to the law school, but we were mistaken, for instead of that situation, we



had the largest number of pupils enrolled that we had ever had. And so I say a high standard of requirement does not keep the worthy individual who has the proper ambition from fighting his way to the front. In the past we have been going along in kind of a slipshod way, but we have managed to survive, and there is no reason why we should not try to benefit, no reason why we should stand still and let well enough alone when it is really not well enough. Talking about John Marshall and Abraham Lincoln and those great men of the past, those men who lived at a time when education was not so available or cheap, it is unthinkable to believe that if those men had lived in a day like this, they would not have been college men. Take James L. Pettigrew, the man after whom our law building is named, and who was perhaps the greatest common law lawyer our state has produced. There was no law school for him to go to, and yet he learned law, and then in turn he was a law school for many young men. A great many fine lawyers graduated from his office. There is no such opportunity for that sort of thing today. So I say it is time we took this further step. It is not something we can expect to get next year or even the year after, perhaps it is going to be a long time before we get it and a hard fight, but this is an ideal towards which we should work.

**Rowland Taylor, of Idaho:**

I am not so fortunate as the gentleman from Tennessee. I cannot say what Idaho will do or will not do, but I do know this, that we are a young state and try to be progressive. We have all kinds of people in our state, but we realize that we must have the best in every line. About 80 per cent of the members of our legislature are farmers, and I believe those farmers want the best obtainable in the line of lawyers, and I believe that they will make some provision to take care of us in our state university if we raise this requirement.

What I arose for in particular was this. It has been emphasized all the afternoon that we must not make arbitrary requirements, and one gentleman from the platform said that it could not be done in an institution which used the state funds. I want to say now that there is in practically every state institution an

arbitrary requirement. If that were not true it would have to be abolished.

There is one more little thing, and that is we are not going back to unseat Washington or Lincoln or anybody else. We are not living in the past. We are going to live in the future, and I do not believe that any one of these gentlemen would go and get a witch doctor if he had a sick child, and so I ask what does he want to get a witch lawyer for?

John B. Sanborn, of Wisconsin:

The gentleman from Maryland, as well as some others, made the statement today, which we have heard before, and may hear again, that a Bar examination is an adequate test of the law student's preparation. Now, having been a Bar examiner myself, I think I know something about it. No Bar examination has ever been devised which cannot be passed by proper cramming in a very brief period. You do not have to know law, you only have to know what the examiners are going to ask and be prepared for it.

Mr. Dawson:

Would two years at a college be any guarantee that he had not crammed that?

Mr. Sanborn:

Certainly not. Now, of course, no one can contend that two years at college and three years at law school and the ability to pass a Bar examination is an absolute guarantee that a person is going to be a good lawyer, but it is a better guarantee than the law examination alone is.

W. A. Hayes, of Wisconsin:

It may be some encouragement to the advocates of the resolution if I call to the attention of the Conference a specific example of the benefits of adequate training. One week ago yesterday there became Chief Justice of the Supreme Court of Wisconsin a man who 50 years ago was a boy on a farm in Norway. He came with his parents to this country in 1870 or 1871 or 1872 and went to Iowa. He had in him definiteness of

purpose and tenacity of purpose. He insisted on getting a college training before entering upon the study of the law, and he got it. He was poor. He was a boy of 12 or 14 when he came to the country. He spoke a foreign language. He went to a new and unsettled section. But he acquired a college education, and he sits today as the Chief Justice of the Supreme Court of a great state. He never would be in that position if he had not procured that college training. He is perhaps today the most striking living example of the truth of the maxim that Mr. Root put forward this morning, that attendance at an American college for a substantial period of time was essential if one is to become imbued with the spirit that lies at the foundation of the institutions of the country. It is only there, in communion with men of high character, in touch with men of broad thinking, in daily contact with men of the highest ideals, mingling with the young and ambitious, it was only there that the man I refer to caught the spirit, that he gained the idea that little by little grew into that broad apprehension of American institutions which put him where he is today.

J. Zach Spearing, of Louisiana:

Mr. Chairman, it seems to me that in the discussion by those who are unfavorable to the resolutions they have overlooked the fact that we are dealing with present conditions and not with those that existed 50 or 60 years ago, or a century and a half ago. The world has progressed, we have made advances, and the law must keep up with the progress. We would hardly say that it was undignified for a President of this great country to ride in a handsome automobile because Thomas Jefferson walked to the inauguration. So we would hardly say that a man should not have a college course when it is within his grasp simply because 50 or 60 years ago the attainment of that object was denied him.

We must remember that these resolutions look to the present and to the future. There is no attempt, as I understand it, by the passage of these resolutions, to rule out of the legal profession or off of the Bench those who by reason of not having had an opportunity in the past have had to acquire their training and legal education without the schooling which it is proposed to

require. If so, many of us, the speaker among the number, who are now in the profession, would either be ruled out or never would have been admitted to practice.

The object of this is to raise the standard of the profession. Look around at the young men who are coming to the Bar in your various towns and cities. It is true as to my state, and I know it is true elsewhere, that the young man who is making progress, that is standing for high ideals, that has in a short space of time attained a prominence and standing at the Bar, is the man who has the higher education—because the higher education gives him the ideals and gives him the standing and gives him the training to reach in a comparatively short time the pinnacle and the standing that it has taken others a long time to attain. You look at those members of the profession that are debasing it, that are not up to the standard, who are petty-foggers, and you find that they are the men who have gone through a Bar examination before a committee, because they had not the educational qualifications to go to college, or they are men who have gone to a college of low standard and they have never been imbued with higher ideals of the profession.

Let us move with the world, let us progress, let us go forward and keep with the other professions—the medical, the dental, the clerical professions—and get into our profession the men of high ideals, men who have been helped by the higher education. It is not an unfailing standard, I do not understand that anybody claims that it is an infallible standard, but it helps, it does raise the standard, it is a better one than existed 25 or 30 or 50 years ago. And so we shall keep up with the march of progress, and we should say to the people who want to practice law now that they ought to rank relatively as high as did the men who were admitted 40 or 50 years ago.

Julius Henry Cohen, of New York:

In order that the delegates may appreciate just what they are doing, I would like to ask my friend from Tennessee a question, if he will be good enough to permit it.

Mr. Keeble:

I will answer it if I can.

Mr. Cohen:

Assuming that in some of the states of the union the situation is as serious as has been described and that it is absolutely essential to promptly raise the standard for admission to the Bar, and assuming that the conditions in your state are such that standards of education for practice there should not be so high, would you have the delegates from states that need the raising of the standards of preliminary education vote "yes" upon these recommendations even if we were convinced that in your state it might prove to be a hardship?

Mr. Keeble:

I will endeavor to answer the question. The State of Tennessee has never been so selfish as to demand that if a condition exists in a sister state as terrible as the gentleman from New York has made out, that the requirements that might apply to our state should be those applied in his state. I am perfectly willing, and I think from what you tell me, that whether it would save the state or not, it is worth trying, and I would join in a recommendation that it was the sense of this body that the State of New York be urged to adopt this law.

Mr. Cohen:

Would you have the standards of your state lowered to the standards of the greatest state in the union?

Mr. Keeble:

I think we would have to lower a great many standards in Tennessee to compare to the wickedness of some other states. I want to make myself clear. I do not disagree with the other gentlemen who have spoken as to the advantage that education is to a lawyer, but I know as a practical question that we cannot get a law like the one proposed through the legislature of Tennessee; and, secondly, I do not think it is required for every man that practices law in the State of Tennessee at the present time to have the preliminary education and training that is proposed. We have not got those problems down there that you gentlemen have in New York.

The Conference adjourned until 8.30 P. M.

## EVENING SESSION.

*Thursday, February 23, 1922, 8.30 P. M.*

The meeting was called to order by Hampton L. Carson, of Pennsylvania.

Chairman Carson :

Ladies and gentlemen, the very agreeable duty has been assigned to me of occupying the Chair this evening. It is no part of the function of a presiding officer to make a speech or to endeavor to anticipate the substance of the paper to be presented by the speaker. But we have met under somewhat unusual circumstances. The medical and the legal professions are tonight drawn together in close, sympathetic intellectual touch.

I remember some 10 or 12 years ago when I was in London and exploring some of the old book stalls along Holywell Street, I happened to pick up a little pamphlet of about 70 pages printed in London in the year 1690, which was eight years after William Penn had obtained his charter for Pennsylvania, which pamphlet contained an account of "Ye Flourishing Province of Pennsylvania," at that time consisting almost exclusively of the town of Philadelphia, with some 2000 inhabitants. The writer, after speaking of the butchers and the bakers and the brewers and the jewelers and the masons and carpenters, said, "of doctors and of lawyers I shall say nothing, because the place is very peaceable and healthy." And then he added this pious prayer: "Long may we be preserved from the pestiferous drugs of the one and the abominable loquacity of the other."

It was in that happy association, Dr. Welch, that the history of Pennsylvania started.

Now William Penn, before he left England, appointed his cousin, William Crispin, to be the first Chief Justice of Pennsylvania, and Crispin started out in advance of the great proprietor. He was taken ill at sea, and according to an experience not entirely beyond our own knowledge, there being a doctor on board, the doctor happened to survive the patient and it was the doctor who became the first Chief Justice of Pennsylvania, Dr. Nicholas Moore. History tells us that he was promptly impeached for ignorance of the law and for arbitrary ways, and he

had to resign his office. It was a doctor who was the first Speaker of the Provincial House of Assembly in Philadelphia, Dr. Thomas Wynn, ancestor of Hugh Wynn, about whom Dr. Weir Mitchell wrote so charmingly in that celebrated novel. The doctors and the lawyers had a sort of neck and neck race for some time. Gradually the lawyers forged ahead owing to the circumstance that the doctors introduced the practice of phlebotomy. Everybody attacked by a fit or fever was copiously bled. And now, in some mysterious way, there is a popular impression that the gentle art of bleeding has passed from the medical to the legal profession. Of course that is a mere matter of superstition.

Well, doctor, we have been perplexed about certain problems of great consequence to ourselves, and that is a matter which affects our intellectual and our moral influence. We are endeavoring to lift the standard of the profession. You representing, sir, as you do, a body which has given special attention to the study of problems affecting medical education, have been kind enough to come here, sir, in order to address us on certain problems affecting medical education, and in that way give us useful suggestions of which we may reap the fruits.

I take great pleasure in introducing to you Dr. William H. Welch, Director of the Department of Hygiene and Public Health of The Johns Hopkins University.

Dr. William H. Welch, of Maryland:

*Mr. Chairman and members of the Conference of the Bar Associations, ladies and gentlemen:* I have assumed, Mr. Chairman, that the only occasion for my presence here tonight is to play the part of a consultant, on the assumption that you believe there are sufficient analogies between the problems of medical education and of legal education to raise at least a presumption that the experience of the medical profession in bringing about a very marked and very rapid improvement in medical education may have some helpful suggestions, if not really furnish an example to you in the solution of the problems which you face in legal education. And this belief I find not only expressed by you tonight, Mr. Chairman, but repeatedly implied and expressed in the writings in law journals and elsewhere on this general subject of improvement of education in the law.

Now I must leave it to you to see the bearing, if any, between what has been brought about in the way of improvement in medical education and the qualifications required to practice medicine and the advance in the standards of legal education and admission to the Bar. While the contents of the two subjects of law and medicine are very different and the methods of training for the practice of each are equally diverse, the two professions have certain fundamental subjects in common which bear upon the questions just raised.

Law and medicine are two of the three traditional learned professions with existing and continuous traditions and history from antiquity to the present day, each having an important relation to the foundation of universities in the middle ages. Each profession stands in such a relation of responsibility and of service to the community that the public recognizes, however inadequately, that the proper fulfillment of these functions requires some principles of conduct and the possession of specialized, often highly technical knowledge, and as a rule endeavors, however imperfectly, by legislative enactment or judicial procedure to secure corresponding qualifications for professional practice. Leaving aside for a moment the contention to which I shall have occasion to refer later, that there is a political aspect to the government and administration of law and justice which affects fundamentally the consideration of problems of medical education, it would appear that in spite of all diversities of subject-matter, of methods, of functions and of aim, there remains enough in common between the two professions in their historical background, in their cherished traditions of character and learning in their foundation of learned professions upon adequate standards of education, both local, general and special, in their organization and in the vital interest to the community in safeguarding entrance to the profession by the establishment and enforcement of proper standards of qualifications for practice, to justify the expectation, confirmed indeed by experience, that each may find helpful suggestions in the methods, accomplishments and experiences of the other in their efforts to attain their respective aim in the field of education and of admission to practice.

It would lead altogether too far afield to attempt even a brief survey of the historical development of medical education in this



country; but there are certain points in this development which it is necessary for our purposes to touch upon. The first of these is the extraordinary fact that the apprenticeship system—which in colonial days was the only available method of medical training in this country, until the establishment of the medical department of the college of Philadelphia, now the University of Pennsylvania, in 1765, and that of Kings College, now Columbia University, three years later—has lingered on in legal training up to the present day, although with diminishing emphasis, in the form of the clerkship or pupilship in an attorney's office as a substitute for, or required supplement of, a systematic study in a law school.

With the provision of an over-abundance of medical schools after the first third of the last century, no one entertained the idea that an adequate undergraduate medical education could be obtained outside of a medical school. The reason for this difference between law and medicine is, of course, due not to the lack of law students, of which there is a superfluity, but to the absence in a law school of opportunity for practical training comparable to that furnished the medical students by laboratories, dispensaries and hospitals.

The greatest of the recent improvements in medical education has been in the increase and better utilization of the opportunities for clinical training.

Here I trust that you will indulge the query of an outsider on a controversial matter, as to whether the problems of legal education are not unnecessarily complicated by the perpetuation of a system which, whatever its merits under simpler and different conditions, has outlived its usefulness with the enormous increase in the bulk and complexity of case and statute law and the changes in the organization and practice of lawyers' offices. May not practical training be provided in law schools even superior to that to be derived from service as a clerk or pupil in an attorney's office, and in any case is not the time of the student spent to greater advantage in systematic study in the school? At least so far as medicine is concerned routine is picked up only too easily by the medical graduate.

Law and medicine have suffered almost equally in this country from the severance of their schools from intimate integral connection with universities, their historic hope; but this defect

has now been remedied almost, though not quite completely, so far as medical schools are concerned.

Most of the medical schools, and all of the better ones, are departments of universities coordinate with the other faculties and completely under university control. This has been an incalculable gain both for medicine and for the universities, and I doubt not would be as great for law, if it could be secured in equal measure.

The great achievements in the last two decades in the improvement of medical education have been the extinction of most of the independent proprietary medical schools conducted for gain, which were the great evil of American medicine, and brought our medical schools to the low estate to which they sank during most of the 19th century and at the same time an equally remarkable advancement in the educational standards and facilities of most of the remaining schools.

The result has been fewer schools, more numerous and better opportunities for obtaining a good medical education, a great reduction in the total number of students of medicine, followed in the last three years by a decided upward trend and a marked preference of these students for the better schools. How great and how rapid these changes have been may be illustrated by the following startling figures taken from reports of the Council on Medical Education of the American Medical Association.

In 1904, when the council began its work, the United States had 162 medical schools, or over half the world's supply, with 28,142 students, and with only 3 per cent requiring any college work for admission.

In 1921 there were 83 medical schools (as contrasted with 162) with 14,872 students and with 92.8 per cent requiring two years of college work for admission.

During the same last 15 years the proportion of medical students in well or fairly equipped medical colleges has increased from 3.9 per cent to 96.1 per cent.

It is interesting to contrast with these figures those for law schools. In Mr. Reed's valuable studies for Carnegie Foundation, we find that in 1900 there were 102 law schools, with 12,516 students and in 1921, 147 law schools with presumably not far from double the number of students, if one may judge

from the average increase up to 1917, the last year for which I find a statement. Of these law schools, over one-half are part-time schools and 89 require no college work whatever for admission. It is evident that the development of law schools during this period has been the reverse of that of medical schools as regards the increase in number both of schools and of students, and that the requirements for admission are much lower for the majority of law schools. I shall not pause to inquire whether the law has become the refuge of students now excluded from medical schools, or whether there has been such a conquest of disease as to require fewer doctors, or whether accompanying this more robust health, there has been such an increase of litigation as to necessitate doubling the number of lawyers in 20 years. In view, however, of some alarm expressed both within and outside of the medical profession that there is a shortage of physicians, I may remark that the dearth is confined to rural districts and is due to other causes than an insufficient number of physicians in ratio to the total population, which is now twice as high as that of Great Britain, the country with the next largest supply of doctors.

How to secure a better distribution of physicians is an important subject, but this is not the occasion for its consideration. It may be said, however, that there is general agreement that the reduction in the number of medical schools has gone as far as is desirable. I judge that the time is remote, if it ever arrives, when it will be necessary to provide against shortage of either law schools or of lawyers, whatever may be the need of better ones. It is not surprising that such remarkable changes, which are certainly in the direction of reform, as have been brought about in so short a period of time in medical education, should have arrested attention even outside of the medical profession. Your interest in this matter relates mainly to the influences and agencies through which these great improvements have been effected. Insofar as these may have a bearing upon the legal education I may say at once that by far the greatest single agency in effecting the elimination of inferior medical schools and in elevating the general standard of medical education in the United States has been the Council on Medical Education of the American Medical Association. But before con-

sidering this organization and work I desire to call to your attention certain other factors which have been concerned bearing constantly in mind their possible bearing upon problems of legal education.

First may be mentioned the advances in knowledge, both in the science and art of medicine, exceeding during the last half century all that had been attained before in human history, and still progressing with rapid strides. With this new knowledge has come to the physician and the sanitarian increased power to control disease both by prevention and by cure, improved methods of diagnosis and of treatment, and new lines of attack upon the problems of disease and injuries. It is not necessary on this occasion to develop this fascinating theme, for it must be obvious that the demand for such improvements in medical education as shall train physicians to supply to the community the benefits of the best that there is in medical school and knowledge, has acquired an urgency and insistence which it could not formerly claim in anything like equal measure. It is the force of this appeal which has not only driven university and medical school educators to set their house in order, but has also brought to the aid of medical schools generous gifts of public-spirited philanthropists, and especially of the General Education Board, the Rockefeller Foundation, the Carnegie Foundation for the Advancement of Teaching, and the Carnegie Corporation which have naturally been desirous that their donations should be wisely expended. Of even greater significance is destined to be the more generous support of their medical departments by both state-supported and privately endowed universities. Advancement of scientific and practical medicine and the resulting strength of the appeal that can now be made for private and public financial support of medical schools and their hospitals are fundamental factors in bringing about the recent improvement in medical education. So far as cost is concerned, law is situated both more favorably and less favorably than medicine. More favorably insofar as the expenditures for the establishment and maintenance of even the best legal school does not approach the cost of a good medical school; and less favorable in that this relatively small cost favors the establishing of low grade and needless legal schools, a circumstance which doubtless

accounts largely for the enormous growth in the number of law schools during the last 40 years.

In this connection I raise the question, leaving it for you to answer, whether the developments of recent years in the science and art of jurisprudence, the vast growth in bulk and complexity of substantive law and improved methods of teaching are not calculated to create the necessity and the demand for improvement in legal education comparable to that required in medicine as the result of new discoveries in advancing knowledge.

An important influence in raising the general standard of medical education has been the example of a few superior medical schools.

Until the opening of The Johns Hopkins Medical School in 1895 the improvement was spasmodic and slow, consisting chiefly in raising the course, lengthening the period of study and making some feeble demands for preliminary education. The medical departments of Northwestern University, of the University of Michigan and the Harvard Medical School, took the lead in these advances. The standards set by The Johns Hopkins Medical School were far in advance of any existing for medical education up to that time in this country as regards the requirements of preliminary education, the provision of laboratories, full scientific teachers, and the methods and opportunities for clinical training. It remains still the only medical school requiring for admission a college degree.

In medicine as in law schools of a high grade, furnishing excellent educational opportunities and exerting a wide and beneficial influence, have been developed. Some particular law schools have made highly important contributions to legal education; but it is well to remember that these do not determine the average standard of professional education, which in the last analysis do not rise much above the minimum requirements of admission to practice. To raise the general level, the crucial matter both for law and for medicine is of course the establishment and enforcement of high standards of admission to practice. The first step is the separation of the right to practice from the mere possession of a degree or diploma of graduation from the professional school by the creation of state examining and licensing boards.

This I have written by way of introduction to what I have to say regarding the path blazed by the American Medical Association mainly, and some other agencies, in the improvement of medical education.

The American Medical Association was founded in 1847, with the express purpose of bringing about an improvement in the education of medical students. It never lost sight of this purpose; but not until a reorganization of the Association, which took place before the beginning of this century, were the efforts of the American Association which were directed to this need accompanied with any decided degree of success. The Association at all of its meetings passed resolutions, made recommendations, created committees, and had sections on education; but it exerted practically no influence upon an elevation of the standards of education. Now this reorganization of the American Medical Association, which began in 1898, and which has been described and set forth pretty adequately in several legal articles that I have seen, and quite concisely but very accurately by Mr. Reed in his valuable report to the Carnegie Foundation, had this important result, that the American Medical Association was so reorganized that practically the whole body of the profession became members of the Association, the unit being the county medical society, leading up to the state medical society, and membership in the state medical society is *ipso facto* membership in the American Medical Association. It is therefore in every sense of the word the representative of the entire profession; and it is important to bear in mind that these great reforms of medical education have originated in the body of the profession, among the practitioners of medicine, not as a result of pressure from the outside by the general public, and not from a stimulus derived from our medical schools.

I shall not comment upon the differences in the organization of your American Bar Association, the National Association, and the state and local bar associations, save to remark that they hardly can be said to represent the entire body of the legal profession in quite the same way, with the same steps socially, as does the American Association represent the body of the medical profession.

Soon after this reorganization a council on medical education was created, and it is the work of the council which has been so significant in bringing about the improvement to which I call attention. It is hardly necessary to describe in detail the organization of the council. It will suffice, I think, to point out certain of the salient features. It is an organization with executive officers who are paid, and some of whom give their entire time to the work. Its first activity was in securing active cooperation with two very important bodies, namely, the Association of American Medical Colleges and the state licensing boards. It was obviously a primary essential to secure the cooperation of the medical schools on the one hand and of the examining and licensing bodies on the other.

Now a feature of the work has been, not through any legal action, but solely by moral pressure, to induce the state licensing and examining boards to raise their standards for admission to the practice of medicine to a point more nearly in conformity with the demands of modern medical education and medical practice than those which existed previously. That, as I have intimated, is the crucial matter, of course, to secure the establishment of these standards. That has been brought about, so far as medicine is concerned, over a very large part of this country. Medical schools are necessarily forced to the wall and out of existence if their graduates are not eligible for admission to the examination of these licensing boards. At present 33 of the licensing boards of the various states of the union require that the candidate shall have graduated from a medical school which requires at least two years of college work preliminary to entrance upon the medical studies. This, you see, automatically secures that very important improvement.

A very important feature of the work has been publicity and classification of the medical schools. This publicity has been based upon actual study, observation and inspection of the different schools. Standards which are easily applied, and which I have every confidence are justly applied for the classification of the medical schools, are based upon their facilities for training medical students, upon the number of full sized teachers in the faculty, and the clinical and laboratory facilities, and to some extent also upon experience with the graduates, and to what extent

they are able to pass the examining boards. In this way medical schools, if unable to meet these requirements, have been forced to the wall and practically out of existence.

Very soon after the work of the Council on Medical Education was initiated there appeared one of the most epochal reports in all educational literature, that of Mr. Abraham Flexner to the Carnegie Foundation on the conditions of medical education in this country. That report had a very great influence not only inside of the medical profession, but possibly to an even larger extent on the general public, and particularly in college and university circles. It is one of the most important, influential, persuasive documents in this story of the improvement of medical education in this country. Universities that knew little about the character of the medical schools with which their names were connected were aroused to a situation which demanded their attention and secured their attention to a very large extent.

It is therefore by this publicity and this system of classification of medical schools, and through the influence of the Flexner report, that, more than in any other way, these very important reforms in medical education have been secured. I have brought with me samples of the reports and documents which show how the Council on Medical Education proceeds. This one which I hold in my hand, for example, is an extremely important one, widely distributed. It is entitled "The Choice of a Medical School." That goes to students in our colleges. It contains the essential information to enable a student to determine whether or not a school which he may contemplate entering meets the requirements, whether it is in Class A or Class B or Class C. The table will show whether graduation from that school entitles the graduate to be eligible for examination by the state licensing board in New York, in Pennsylvania, in Maryland or in Illinois. All that information is contained in this pamphlet.

Chairman Carson :

How is it published ?

Dr. Welch :

This is published by the American Medical Association, the council being entirely supported from the funds of the American



Medical Association. And as you can imagine, such publications as this illustrate why it is that now the great majority of medical students are seeking to enter the better medical schools. The information formerly not procurable or difficult to get is in this handy shape and contains all of the essential facts.

These annual reports of the Council on Medical Education are very important examples of the sort of work which this admirable council has done. These annual conferences, such as you are initiating here today and tomorrow, conferences of the Council on Medical Education, bring together the representatives of various medical schools, the Federated Board of the State Licensing Board, invited delegates, representatives of the universities and colleges. These conferences have become very significant and very important. Valuable discussions take place and an interchange of opinion is had, and while, as I have already stated, the conclusions reached have no legal force or effect, they exert an influence upon opinion, and upon the activities of these institutions, which is simply of incalculable value.

There have been certain criticisms and objections raised which I may perhaps for a moment touch upon. I should like to say just one word about the contention of Mr. Reed in that very helpful and important report of an essential and fundamental difference between the medical profession and the legal profession in the fact that the lawyer has political and public functions, or is likely to have, and that it would be most undemocratic and most undesirable to fix standards for entrance into the profession of the law such that all economic classes should not be represented.

I would simply remark that it seems to me as if the performance of these functions, additional, as I conceive it, to those of his relations to his client, functions which he describes as public and political in relation to the government, the administration, the development and the administration of justice and of law, would require better education, would be an argument for better education rather than for a lowering of the standards. Nor am I quite willing to concede that the difference is so great between the two professions in this regard. The preservation of health is of extreme importance to the community. It requires the activities of administrators who are governmental appointees.

It stands then in a public relationship which, while of course not exactly comparable to that of a lawyer, is still a public function. And we consider that these activities of the physician require conditionally a specialized training, preventive medicine as contrasted with curative medicine, requires training in addition to that which is furnished to the practitioner of medicine.

I shall, of course, not discuss the question, because I have not competence to do so, as to the matter of classification of the Bar with reference to there being different grades classified according to their function, but I would remark that the example which he cites as an analogous situation in medicine, namely, that we separate, grade as it were, the dentists, the nurses, the apothecaries, the veterinarians, and that that would be an analogy to a somewhat similar classification of the Bar. I should consider that the analogy, so far as medicine is concerned, if one seeks for functional differences among the members of the two professions, would be formed in the distinction between consultants, if you like, or specialists most numerous and varied, and often requiring quite special and technical training. The general practitioner, the sanitarian, those it seems to me are the functional differences in the profession of medicine which have some analogy to similar differences in the practice of the profession of the law. And we should not consider it at all desirable to have any different standards of admission for those who are exercising later these various functions, any different standards of admission to the practice of medicine. In fact, the great emphasis and importance is attached to seeing to it that a good, broad, general training is the foundation for all of these subsequent directions of specialization. I have not exhausted by any means all of the varying functional activities if one cares to consider them, but I would call attention to the fact that that seems to me to be the analogy rather than between the apothecary, the nurse and the doctor, in considering the particular point discussed by Mr. Reed.

We are very, very familiar in discussions of this matter in medicine with the cry that we are closing the door of opportunity to the poor boy, or the cry that there have been great doctors who never had anything comparable to this elaborate education. They say, "These men never went to college, and we can point

to them as shining examples whom we honor." Now a selection of some sort is implied when you make demands such as are embodied in the recommendations of the Bar Association requiring that the candidate for admission to the Bar shall have been graduated from a legal school requiring two years of college work preliminary to entrance upon legal studies, just as is done in medicine. But the selection is really not on the ground of the pocketbook, it is rather on the ground of mental capacity of certain general character. It is not so easy to pass along the path if there are obstacles in the way. But is it to be supposed that a man like Abraham Lincoln in your profession, or Ephraim McDowell or Nathan Smith in ours, would not have overcome handicaps and obstacles, and in overcoming them that they would not have become even more alert, even more resourceful, and have derived distinct advantage from the very fact that they had to overcome certain obstacles? The requirement of two years of college work has not eliminated the poor boy who has to work his way through college and through the medical school. I thought I would inquire about that very question this morning from our dean. He tells me that over one-half of the students in The Johns Hopkins Medical School—and we require a completed liberal education, a college degree—over one-half were working their way through in part or in whole or have borrowed money to accomplish their education. Money can be secured very often because of the very fact that the young man possessed (and now-a-days young women, too, in medicine) certain qualities which make a public-spirited man glad to lend aid, making him willing to make the investment in that young man, and he expects a return from it. It does not result in the elimination of the poor boy when you require a better standard of preliminary education. But it is to be desired that in all classes there should be some method by which we are able to lessen at least, if not to exclude, those who are unfitted for the study of the law or medicine. They have not the mental capacity, they have not the industry, the energy, the character, the intelligence. If you are familiar with the discussions as to the situation in our colleges and universities today, you will know that that is just one of the points, how is it possible to make the selection based upon securing those who are really fitted for a

higher education. I think that one of the methods is not so much a selection on an economic basis, but this is more likely to secure those with a desire, with the ability and strength of character and persistence of effort and industry than otherwise would be possible. So I think the selection is along the lines of the community, resourcefulness, and ability and enthusiasm of the young men. Anyhow, we encounter precisely the same criticism which I see is urged against these higher standards in the law. As regards the requirement of two years of college work, it is of course a pity that we have to either truncate the college course or telescope it into the professional education. There seems to be no other way.

As I have said, at Johns Hopkins we do make it straight on to the college, and curiously enough, the average age of graduation of our students is not far from the average age of graduation of students throughout the whole country.

Still, I do not urge that as a national standard, although it is to be hoped that if two years' college work are required there will be a considerable number who will go on to the completion of the college course.

But our colleges have developed as enormous institutions, as you know, and without regard to the needs of the professional education, except possibly that of theology in the past, and the efforts now to adjust the requirements of training in the profession to conditions in our colleges, these efforts encounter very great obstacles. I do not consider that this solution is the final one, this truncating the college course, dividing it in two; but it seems to me that for the present it is the most that can be attained and is to be regarded as our national American standard. It is so for medicine, and I doubt not that it will eventually be so for law.

So it seems to me that in many ways your problems for legal education are easier than ours. In that respect I may be mistaken. But you have not in the first instance to encounter the difficulties which we have in consequence of the existence of so many different sects and nondescript practitioners of all sorts of dogmas and doctrines in medicine.

I need hardly say that I am speaking in behalf of scientific, non-sectarian medicine, belonging to no school whatever, any

more than chemistry does, or physics, in which the guiding principles are the advancement of knowledge through the well-known scientific methods of observation and experiment, tested by experience, hoping that eventually we shall be able to base more and more of medical practice upon ascertained scientific discoveries as we are able to do in increasing measure every day, not committed to any dogma or doctrine which is regarded as a universal explanation of all diseases, and affords a guiding principle of all means of treatment, at the same time enabling the doctor to practice anything whatever that he considers to be of possible value in the relief of human suffering and the treatment of disease.

Now you have not to contend with all of these sects in law. The principle is of course only that we desire for the benefit of the community that there shall be adequate educational professional training for those who are called upon to administer to the sick and injured, that is all, without any reference to systems of practice—that is for the benefit of the community. And, again, you have not, I think, to consider to the extent that we have the credulity of the public in all of these matters. It has always been so. Doctors are very much too sensitive about these matters. Anything new, these various sects in medicine, have always arisen. They always have something in them. As Dr. Osler once told me, "The worst thing I know about the quacks is that they cure people." You have not in the same way, I think, to contend with all of these sects and fads and so on that we meet with in medicine. So I think in those respects, at least, you have a very decided advantage.

Chairman Carson:

There was Dr. Duck, who sold quack pills. That was an English case.

Dr. Welch:

Yes, I know about him. On the other hand, it is barely possible that the public is more interested that there should be a higher technical training, more certainty of the possession of adequate skill, on the part of the physician, than as to the technical attainments of the lawyer. I am not prepared to say that may not be the case. But, however it may be, we are both in-

volved upon the same undertaking, to elevate for the benefit of the public, and not for the benefit of our respective professions, the standards of education, the qualifications for admission to the Bar and to the practice of medicine. Our motives are entirely—I think I am justified in saying—altruistic. I am sure we have nothing more in mind than what is best for the good of the public.

Now, if in what I have said as to the experience in bringing about these great reforms in medical education and in the license to practice you find any hints, any suggestions, which may aid you in your efforts to secure similar results in legal education and admission to the Bar, I shall feel very proud and very abundantly justified in coming here and having this opportunity, which I appreciate most highly, of addressing you; and I beg in closing to reciprocate the very kind remarks that have been made as to the intellectual and sympathetic relations between our two professions and the hope I may venture in behalf of all my colleagues in the medical profession, some of whom I see here in this room, to bring to you, the legal profession, our most cordial greetings and to wish you the greatest success in the undertaking which you are facing by this conference tonight.

The meeting adjourned until Friday morning at ten o'clock.

## SECOND DAY'S PROCEEDINGS.

### MORNING SESSION.

*Friday, February 24, 1922, 10 A. M.*

Chairman Goodwin :

The Federal Bar Association of the District of Columbia has sent a copy of the resolution which they desire to offer to each member of the Conference. Of course there can be no time given to any suggestion that is not on our program. This, however, is a resolution with which we have sympathy, and I am going to ask if I may have unanimous consent to take a vote on it. If there is any objection or any difference of opinion we cannot do it, of course, because we have no time to discuss it, but if we are unanimous we can express that opinion.

The resolution is :

*Resolved*, That this Conference recommend that the Congress of the United States in its consideration of the pending bill providing for a classification of civilian positions in the government service should establish schedules which will tend to attract and retain the services of the best legal talent.

(The motion, having been duly seconded, was put and carried without dissent.)

Some years ago a lawyer, the son of a Tennessee judge, who had had some connection with affairs of importance and had had been instrumental in connecting the City of New York with the great State of New Jersey, was brought into the office of the Secretary of the Treasury. During the war there was an obligation cast upon him greater in character, larger in extent, than had been put upon the shoulders of any Secretary of the Treasury in the history of the country. It was an obligation to be responsible in a way for furnishing the means, not merely a financing the war so far as we were concerned, but so far as our Allies were concerned. He was also given the obligation of assuming the burden of unifying the great transportation facilities of the country. These matters brought him in contact with the great financial interests of the country and gave him a power

and financial influence such as no man had ever had before. He, following the traditions of the American Bar, and doing exactly as any representative member of the American Bar would, conducted the affairs of that great office in that critical time in such a way that at the end of his service he came out financially destitute, but maintaining the high ideals of American citizenship and the American Bar.

It gives me great pleasure to ask Mr. William D. Guthrie, President of the New York State Bar Association, and Mr. James Byrne, of New York, President of the Association of the Bar of the City of New York, to escort to the chair the Honorable William G. McAdoo.

William G. McAdoo, of New York:

It is scarcely necessary for me to assure you of my great appreciation of your invitation to share, with the Chief Justice of the United States and other distinguished gentlemen, in the honor of presiding over the sessions of your Conference.

A Conference of delegates representing the American, state and local bar associations of the country to consider the very vital question of admissions to the Bar, is a significant and dramatic event in the history of the profession. You have assembled for the specific purpose of discussing the recommendations of the American Bar Association that, as a condition of admission to the Bar, the applicant shall have had two years of study in a college, and a course of three years' duration in a full-time law school, or its equivalent in a longer course in a part-time law school.

One naturally approaches such a question from a point of view influenced in great measure by the course and experience of his own life. For example, a lawyer who has been constantly and exclusively absorbed in the active pursuit of his private practice will instinctively view the question from the standpoint of the good of the profession alone. But the lawyer whose career has taken him away at times from active practice and immersed him in great enterprises or involved him in large responsibilities of public life, is inclined to view the problem not alone from the standpoint of the profession, but also in its wider aspects—its relation to the public good as well as its effects upon the profession itself.



Then, again, the lawyer who has had the good fortune of a college education and of a thorough course in a law school will naturally regard the more exacting requirements in the way of a collegiate and legal education as essential to the welfare of the profession and to the public good; whereas that great body of lawyers who have had to make their own way in the world, who have never been able to go to college and who have secured a legal education through hard work and struggle in the old-fashioned way—in somebody's law office—with the unsystematic training and the less efficient legal education which necessarily comes from an unthorough school of that character, but who, by their ability and industry, have gained a deservedly high place at the Bar, may naturally hesitate to approve the exacting standard which the American Bar Association seeks to impose.

Unfortunately for myself, I was unable to go to a law school. At the age of 18 I had to leave college and face the world. My only opportunity to gain a legal education was through night studies under the tutelage of the late Honorable William Henry DeWitt, of the Chattanooga Bar. And may I digress for a moment to pay a tribute to this noble man and lawyer, jurist and gentleman, scholar and patriot, whose generous friendship and constant helpfulness toward every young and struggling lawyer endeared him, not alone to them, but to the community in which he lived, and gained for him the unqualified esteem and admiration of his professional brethren. Painstaking, unselfish and thorough as this splendid friend and preceptor was, nevertheless it was impossible for his pupil to receive the systematic, orderly and logical education that a properly conducted law school provides. And so, in my own case, I approach the subject from the standpoint of one who knows by contrast rather than by experience the value of the law school education; but that very fact gives me a keener realization of the importance of the educational standard now proposed.

The responsibilities of the lawyer are so grave and the function he performs is so vital that the value of the highest moral and ethical standards cannot be exaggerated. And those same responsibilities make it imperative that his professional education shall be so thorough that he will be equipped in the highest

degree to discharge those responsibilities when he comes to the Bar.

But it is not alone as a member of the Bar that a lawyer is an important citizen and owes great responsibilities to the community. He is a vital and necessary factor in the success of every extensive business enterprise. He exerts a large influence on public opinion and in the main is entrusted with political leadership in the community, the state and the nation.

It is his function not to create strife, but through the processes of the law or through counsel and conciliation, to compose and eliminate it. It is his function not to impede the processes of business, but through clarity of advice and counsel, to facilitate them. Here is this multitude of men, entrusted by the state with the special prerogative of giving counsel and representing in litigation the public at large, and who exercise a great influence over the economic, social and political life of the country.

The American Bar Association's proposal is to create conditions of such a character that in the course of time every member of the profession shall have had at least two years in a university or college, which are, after all, one of the bulwarks of democracy and progress, and shall have devoted himself intensively, at least three years, to the study of his profession. Can there be any reasonable doubt that the success of such proposals will result in the material and moral betterment of the legal profession and of the nation as a whole?

I have in mind, of course, what has been said about the necessity of keeping the profession open to all classes of our citizens and to all ranks of society; but having in view the facilities for education presented by the colleges and the universities of the country and the opportunities offered to industrious and ambitious men to work their way through college, there can be no doubt that the privileges of the Bar would continue to be open to men from every walk of life, regardless of their financial means.

You cannot, of course, under any restricted conditions, have a situation where admission to the Bar is open to every man. The imposition of any requirements at all necessarily means restriction and limitation.

The essential thing is not that every follower of the plough, every worker in the machine shop, every man at the forge, shall have an opportunity to enter the legal profession, but rather that the way shall be open from the plough, from the work shop, and from the forge to the profession of the law, so that men in those callings and similar callings, and their sons, may reach the goal if they have the capacity, the ambition and the willingness to make the sacrifices which proper preparation reasonably requires.

May I not say, in closing, that the suggestions or proposals you are considering are not particularly new, or even unprecedentedly drastic? As far back as February 26, 1821 (more than 100 years ago), Mr. Jefferson, that remarkable sage and philosopher, himself the founder of a great university and a great law school, outlining a course of study in preparation for the Bar, in a letter to his friend Dabney Terrell, enumerates Coke's Four Institutes, the works of Matthew Bacon, Blackstone's Maxims of Equity, and Bridgman's Digested Index, saying that this would require four or five hours a day for about two years. After these, the best of the reporters since Blackstone should be read for any new cases which have occurred since his time. "By way of change and relief," he says, "for another hour or two in the day, should be read the law tracts of merit which are many, and among them all those of Baron Gilbert are of the first order. In these hours, too, may be read Bracton (now translated) and Justinian's Institute. . . . After Bracton, Reeves' History of the English Law may be read to advantage. During this same hour or two of lighter law reading, select and leading cases of the reporters may be successfully read, which the several digests will have pointed out and referred to."

He suggests that in addition to all of this, which refers only to the common law and chancery, the Admiralty law, the Ecclesiastical law, and the Law of Nations should be studied, refers to a number of books on those subjects, and concludes: "Besides these six hours of law reading, light and heavy, and those necessary for the repasts of the day, for exercise and sleep, which suppose to be 10 or 12, there will still be six or eight hours for reading history, politics, ethics, physics, oratory, poetry, criticisms, etc., as necessary as law to form an accomplished lawyer."

Are not 100 years long enough for us in progressive America to mature an equivalent to the Jeffersonian standard?

Chairman McAdoo (continuing):

We will proceed with the order of the day, the general subject for discussion being the general character of a legal education which should be given to those coming to the practice of the law. This subject is divided into four topics, the technical education necessary to enable the lawyer to serve the public is the first part of it. This topic will be introduced by James Byrne, President of the Bar Association of the City of New York, and I now have the pleasure of introducing Mr. Byrne.

James Byrne, of New York:

One day when I was in London I heard that there was a dinner to be given that night by the English Bar to the American Bar, and I went there, and a remarkable dinner it was. There was the Lord Chancellor, Mr. Choate, the Attorney General, the Solicitor General, all the judges and judicial officials of the government, and they made extraordinarily good speeches, and a number of them were directed to the glorification of Americans and the Bar of America. One of them, the Attorney General, spoke of the fact that before the American Revolution there were more copies of Blackstone sold in America than in England. Another spoke of an incident in American history which had always seemed to him to reflect the greatest credit on the Bar of our common country. That was at the time of the so-called Boston massacre. British soldiers were charged with having killed colonists and a British official surrendered his officers to the civil authorities and one of the leading American rebels came to his defense. Another went on to something else that had happened in America. And I said to myself really they are an extraordinarily learned and cultivated body of men. I doubt very much whether in America in dinner we could have referred with such precision to incidents that had occurred in England shortly before the Revolution. The next morning I was going to the Continent, and as I stopped at a book stall I was attracted by a volume, Trevelyan's "The American Revolution," and I purchased it and upon looking it over I saw at page 33 what the

Attorney General stated in his speech, and at page 43 what the Solicitor General had told us in his speech, and at page 52 what the next distinguished speaker had referred to, and so on, and I was struck by the fact that these leaders of the English Bar designedly, and in order, each chose something from this volume for himself and then left something for those who came after. But this is not the situation here. The gentlemen who have preceded me have not only each taken something for himself, but they have left nothing for those that were to follow. Not merely have they left nothing for me, but they took what I had. I had the argument, in the very words in which it was uttered, that if the Bar was not to have a college education, then we were to reverse the whole system of American education so far as lawyers were concerned. The very words that we were a governing class, those were mine, and all the inferences that were to follow from it. After yesterday's proceedings all that was left me last night was to point out the argument that because we were a public profession, it could not be logically said that we should have a less education than if we were a private profession; but Dr. Welch, not even a lawyer, took those words from my mouth.

And so I have been in doubt just how I should act, just how I should deal with this question. Should I say that all of these arguments were great discoveries, which in modern times particularly we know are simultaneously made by investigators in various portions of the world; these rare fruits, did they flash upon minds in New York and Baltimore and Denver and St. Louis at the same moment; or should I say they were like the words of an old song that it does no harm to sing a good song twice, especially if you are to join in the chorus. I finally decided that the fact that we are all repeating ourselves, saying the same things over and over again, shows that those things are true. And if we are to give the lawyer less education, require less of him than of the doctor, and of the American business man who goes to the business school, than of the engineer, than of the individual in the other professions, if we are to say that the lawyer should receive less education than these others, we are proceeding in that direction contrary to the whole theory upon which this country has proceeded as to the value of education from the very beginning. It is also true, true beyond a question, that if we are

a governing class, if we are the men by whom the laws are to be made, or at any rate by whom they are to be enforced, that responsibility devolves upon us more than upon any other profession in the country; and it is equally true that in order to fulfill those terrible responsibilities we ought to have the highest education.

Now I think at the very outset we ought to dispose of one thing. There has been a very able investigation that has gone on for years. The result of the investigation will be of permanent value to us. I refer to the investigation made by the Carnegie Foundation. The title of the investigation is the training for the public profession of the law.

We have all got into the habit of saying that a lawyer differs from other people in that his profession is a public one and not a private one. Now suppose that one of us went to a physician and said "Look here, this is a serious matter, I think. Are you as well educated as the most favored men in your profession?" The doctor replies "Yes, I went to college, I studied four years in a medical college, and then I went to different hospitals." Then we say "Well, on the whole, then, you represent the results of the best education that can be given for your profession?" "Yes."

Very well. Then the patient becomes a client and goes to the lawyer on an important case, and he, in turn, asks the lawyer "have you as good an education as any of the other men in your profession?" The lawyer says "That is an extraordinary inquiry to make of me. No, I didn't go to college, I simply went one year to a law school." Then the client says "But the doctor says he got the best possible education in medicine, he went to college and then afterwards four years in medical school." The lawyer continues "Oh, well, that is all very well for him, but do you know any doctors who are in Congress compared to the lawyers who are there? Can you name a doctor who ever became President of the United States for every dozen lawyers I can tell you who became President of the United States? It is all very well to educate your doctor, who belongs to a private profession, but for my profession you don't have to. You don't think of electing a doctor to Congress. I am the man you are going to send to Congress. It is all very well to give him a college course and

then a medical course, but in the interest of democratic institutions, you have no right to ask me to take a college course and then a law course."

Now, what do you think any client would think of the lawyer who answered him that way. Of course he would think he was a lunatic. Of course, when the client asks the lawyer that question, if he had not had the college education and the training for his profession that the doctor had had in his profession, he would say that it was the subject of the deepest regret to him that he had not, and he would say that he had tried in every possible way to continue his education, such as he had had, and would continue it until the end of his life, when perhaps it would be very nearly the same, or as much as the education of the man who had had every advantage of college course in his youth. There it seems to me we really come to the point of it all.

I do not believe there is a man, there is certainly no man in the City of New York, who is not proud of the position that men in the profession occupy there who have not had the same preliminary education as the great bulk of young men coming to New York to enter the practice of the law have today. Why, it does not make any difference what you do with men of the character, the moral qualities, the persistence, the determination to learn all that is necessary to enable them to serve their clients in the community to the very best of the abilities with which they were born. Of course, we do not have to consider those men, they got all the education it was possible for them to get in their time. If men put obstacles in the way of such men, if they say you cannot become a doctor or a lawyer unless you go through this form or that form, they go through it. So whenever we can say every man will do this or no man can do this, of course we are meeting exceptions in extraordinary men. What we have to think of in the way of educational requirements is what shall be the requirements when it comes to good average men, the sort of man who, if he begins with studies which develop a love of learning and interest in philanthropic thoughts, something besides the ordinary things he needs to make his daily living, will have the desire to go on with his education and learn more and more. If he has learned habits of application in the formative years, if he sees men of great intellect close at hand whom he has learned

to admire, there is a natural tendency on his part as he grows older to have in his mind the hope that he will occupy in the minds of others in the profession the position that those men of learning have had in his own mind. That is what happens to the ordinary man. The thing is to think what the ordinary man—not the man with the burning ambition, not the man with the strong moral sense of his obligation, but the man who is a good fellow, is a good citizen, and has a good brain, what are we going to do to get the very best out of him for himself and for his country. That is the problem before us when we are talking of the education of lawyers.

Now, then, again, we come back to the truism that if we ask that lawyers should be taught any other way than people in other professions are taught in this country, we are flinging away in the case of lawyers all the experience we have acquired with the rest of mankind in this country.

One point that has been constantly in my mind for the last 40 years is not how unfair it was to someone not to let him become a lawyer in some easy way, but how terribly unfair it was to him to permit him to become a lawyer in some easy way.

Why should we let a man who may have a really remarkable intelligence enter into a profession with a feeling of inferiority, thinking from the outset that there is no use of his trying to deal with great constitutional questions, that the police court is the place for him to go to practice. Why should we allow men who may be quite as competent as the great majority of the men in our cities or land who are dealing with important problems of the law, why should we allow such men simply because they do not have a chance, because we did not force them into taking a chance of getting an education and seeing what could be developed from it, why should we be so unfair to those men as to allow them to become lawyers without the proper preliminary education?

I have seen it in my office there, as in most of the larger offices in New York, for 30 or 40 or 50 years, at any rate, that men have been taken from practically a very limited number of law schools. Whether the members of those firms are right or wrong, they thought it made it easier for them to have as their young assistants the men who came from a very small number of law schools. Men grow up in their offices. You may be



sure today that there is not one such office where, if an office boy shows he has very unusual abilities and industry and character, they would not see that the boy learns all about the opportunities for an education, for a scholarship, and the ease with which men can go through the greatest universities after having been provided with a very little money. I say there is not such an office that would not insist on that boy getting as good an education as the most educated man in that firm had for himself. If the boy, however, has abilities which they see might very well be as good as the abilities of most men at the Bar, and nothing further, I doubt whether they would take any very great interest in him. They would hear that he was going to school and studying law somewhere, and they would tell their friends about him, and they would help him to become a lawyer that way, but he would not be taken into that office. He would go into an entirely different branch of the law. They would follow him with interest, and they might send him cases and all that, but that boy would be debarred from the larger character of business that is conducted in those offices. And the reason is that we want men who from the beginning know how to deal with things that are being done on a large scale.

The men coming from the leading law schools have been doing things on the very greatest scale. Talk about the dry bones of a case. What difference does it make, in the excitement of a discussion in a law school, whether you are talking about an actual or hypothetical case of a would-be thief putting his hand in a man's pocket, the question hinging on whether or not there is anything in the pocket to steal or not.

It may be it would be a good thing to have a clinic as they call it, in the law school, it may be that it would be a good thing to open the case system of law schools with a lecture at the beginning, and it may be that the course should be four years rather than three years. There might be more practice. In those things I cannot get any very vivid interest. I am perfectly willing to leave all the details of what should be done in the law school to the men who conduct those law schools, in which we assume that there are excellent pedagogues, who know nothing of the world. Why, they are what Judge Hughes says they are, not the guides of our youth, but the instructors of the profession.

Talk about their lack of worldliness. Why, there is probably not one of them who has not talked with more men who are capable of giving him a correct impression of what is necessary for a man who is going into the profession than any practicing lawyer in this room. What do I know, what opportunities have I to know, beyond certain main principles of what is the best thing to be studied in the law school, of what is the most help to the young man? Every dean of one of those great law schools has a hundred or two hundred men going out every year, men who come back or write to him or talk to him. We gentlemen in the office think that we are the only people who are discussing these young men. Why, they are discussing us. It is like Thackeray's story, that when you pat the little boy you are giving half a crown to and saying "Here, my little man," he is looking up to you and saying to himself "That is a queer old duffer." There are two sides. The men in the law school get the other side easier than we do. Then they are constantly getting this stream of information from these men that are going out every year into the world.

Now, so far as I am concerned, when I talk to members of law faculties about law school graduates, I probably say worthless things. I will probably say something that has occurred to me the night before, because some young man in my office has not found a case. But if I have got to say what I really feel I say this of those men who have been coming to my office for 40 years—and I say it without any of the sentiment that attaches to a retrospect rather than to a present or to the possibility of a future experience—that when men say they did not know how to find the law, I didn't have any such difficulty; when they say they were useless because they did not know practice, I never found any such difficulty. Give them time and point out a form book and with their way of not trusting forms and time to look up the cases, I know they would get out the attachment even in the most despicable technical days of the New York practice—I know it, I have never been betrayed by any of them. For myself, when I came to New York I rather wished they had made me a little less keen about one or two things, but that was simply to preserve my self-respect. It did not make any difference to the firm I went into.

Then you hear today these men from the great law schools talking about other subjects, the future of the profession, the improvement of the law. I do not believe there is a large office but will expect the young men who come into it to do some public work. They will not let them work as we have worked for the last 40 years. They say you have a public service to perform. Dean Pound said in his great address at the Centennial of the Law School, we have got to see in the case of these commissions, for instance, that a yoke is put on their neck, as Coke and the other lawyers in the days of the Stuarts put a yoke upon the bodies who tended to give an oriental judgment instead of one according to the common law.

Then we have to be constantly looking for the future of the law as to what way it is going, and under the leadership of the heads of the law schools, as well as the leadership of the heads of Bar associations and of the profession, these young men, before they have lost the habits of study which they gained in the law school, will be the tools with which this great work of improving the law will be carried on.

Chairman McAdoo:

I may say now that the time is rather short for the discussion of these four topics and the purpose therefore is not to have general discussion until the completion of the discussion as called for by the program.

Mr. Byrne will now be followed by Charles A. Boston, of New York.

Charles A. Boston, of New York:

When I thought of what I was going to say it seemed to me that it should emphasize two aspects of the specific topic which was assigned to Mr. Byrne—the interest of the public in technical education. That indicated a discussion of a technical education, and of a public interest. And then I was invited, as you all were, to read this report of the Carnegie Foundation, and a number of other books, before we arrived at a conclusion, and I confess that I am a little surprised that we have not heard more about this report. It seems to me that the first duty of the Bar to the public with respect to technical education is to educate the Carnegie Foundation for the Advancement of Teaching.

I read the annual report of the head of that institution, his report to the board of trustees, in which he transmitted this report to the institution, and it contained data with respect to the medical profession as well as data with respect to the profession of the law. I confess that I was impressed with what struck me individually as an inconsistency between the attitude of that institution toward the profession of medicine and its attitude toward the profession of the law. I think that this difference was based upon the conclusion, which is stated as a conclusion of the compiler of this report, who confesses that he is a layman and does not look upon this professional question from a professional standpoint. It seems to me that therein the compiler has been led into a most unfortunate conclusion, but fortunately he states that some of his deductions are mere guess work. My own impression was that more than he confessed was mere guess work.

Now, one thing that struck me about his report is the fact that as you read through the headlines—and let me say that it is a magnificent contribution to information respecting education of the profession, it lays the foundation for some very enlightening conclusions, but in my judgment those conclusions are not appended to the report. In reading, the headlines before I got to the conclusion I found one chapter or part of a chapter headed “Failure of the differentiation of the Bar” and the next part was “Failure of the unitary Bar,” so that the writer himself has concluded apparently that there has been already in the experience of the United States a failure of a differentiated Bar, and he thinks a failure of a unitary Bar; and yet, as I read his conclusion, he advocates a differentiated Bar, by a differentiation not of function but a differentiation of education. Though in answer to one of the critics he has said that he has been misunderstood, I think if you will all carefully read that conclusion you will share with me the view that he misunderstands.

Now, as I take it, he advocates a differentiation of the Bar not through differentiation of function, but through differentiation of education, and then he thinks that the function will graduate according to the education. But what does he do in the interest of democracy?—and democracy, as I understand, lies at the foundation of his conclusion. He advocates a distribution of

education according to what he conceives to be a class in the community, so that it will tend to the perpetuation of class instead of the distribution of democracy, and he says "We have it now," because the rich get the good lawyers and the poor get the remnant. And what is the remedy that he suggests? He suggests two,—one, that you should distribute your requirements according to the various institutions trying apparently to elevate slightly the standards of both, but not invading the province of one by elevating it to the standard of the other. And then, most curiously of all, he advocates what seems to me the least democratic and the most snobbish proposition that could possibly be advanced, that there should be the cultivation of snobbishness—although he does not use the word—in the profession by having bar associations confine their membership to those who are educated according to the highest standards.

I do not know anything which in my judgment would be more destructive of the influence of bar associations and more destructive at the same time of the democratic principle upon which he bases his conclusions. There was a statement made here yesterday which it seems to me unfortunately used the word aristocracy, because aristocracy has an unfortunate connotation. I attended the commemoration a day or two ago of one the most advanced institutions of learning in this country, its commemoration day, and I heard the president of that institution express the same idea, in different terms. Recently I came across, in reading an edition of a book of the Second Century, the phrase "tyranny of names." It seemed to me one of the happiest phrases to crystallize an idea. We are under the tyranny of names when we use the term "aristocracy" in reference to intellect. But we are not under the tyranny of names when we use the other, and it seems to me better-chosen phrase, that I heard two or three days ago, that indicated the real danger of this republic in the face of this democracy, and that is the submergence of the few in the interest of the many. And what few? The submergence of the intellectual and the educated few before that tyranny of the word, misunderstood, democracy. It is to the interest of democracy that it cultivate and maintain an educated few that they may be guides and leaders.

One or two things have come into my hands in the last few days, and one of them I think forcibly illustrates the opposition movement to that which we are undertaking. It is an advertisement of a school in New York. It starts out with this false statement of fact. It indicates that the first thing you have to combat in the public interest is a misconception of what you are after, because it says, in holding out a bait to those whom it wishes to enter in this preparatory school, "Recently the American Bar Association passed a resolution requiring the law schools to admit only such students who have completed four years at high school and who have also graduated at college." So this misrepresentation has already begun to operate as a bait to deceive the boys who cannot understand and cannot get information from the proper sources.

Now I have listened to what has been said here, and for the purpose of conciseness of expression and not to wander from the subject, I have reduced to writing two thoughts that I will present to you :

The first has to do with an attempt to analyze the views that have been expressed and are continually being expressed from different sources, and I find that those views fall into four categories, and the first category looks at it from the standpoint of the individual. I say four. Two great categories. The first great category looks at it from the standpoint of the individual, in my judgment, an entirely mistaken category. The second looks at it from the standpoint of the public, in my judgment the proper method of view.

Each of those two is subdivided, and of those subdivisions and an attempt on my part to characterize them I will now read. But first let me say a word in regard to my own personal experience. I am neither a graduate of a college nor did I take a three years' course at a law school, although I think in both respects I acquired an equivalent education. Whether that is so or not, I have been trying to educate myself from that day to this, and expect to continue the effort after I get down from this platform.

So I do not allow my individual experience to determine from favoring the recommendations of the wisest heads in the American Bar Association. I was not required, but far more I was not initiated into these prospects or these possibilities, and I

lament the fact, because when I came to the Bar no such advice was given to the aspiring student. It is only the developments of recent years that have indicated that somebody who knows should tell the law student what he ought to do in order to assume the responsibilities thrust upon him.

In relation to the subject before this Conference there are four views which may be advocated. The first emphasizes the interests and the desires of the individual applicant for admission to the Bar. This view moves along the line of opportunity. There are some people who advocate letting men in, whatever their fitness or lack of fitness.

The second group would require men to submit themselves to particular discipline laid down as the result of experience. Some say, and probably erroneously, that this is a division along the line of "Poverty or Wealth," but it is common knowledge that a poor man can get as good an education as a rich man. Of course there are some poor men who are deprived of that opportunity; but there are many poor men who are able to embrace the opportunity. The cleavage can no longer rightly be considered as one between "Poverty and Wealth" or "Democracy and Aristocracy"—it is but a question of whether the applicant is willing to undergo the requisite discipline. There are many well-educated poor boys, and largely for the reason that so many opportunities are given to the poor boy willing to embrace them. The advocacy of the "poor boy" is really advocating the admission to the Bar of the boy who because of his poverty cannot fit himself for the job. It seems such advocates want the bars let down in favor of poverty and not in favor of ability. The question is: Do those seeking to support this contention give the superior place to disciplined, or do they give the superior place to undisciplined poverty?

The next group is one not dominated by the interests of the individual; its proponents rather emphasizing the interest of the public. This class has two general divisions; one group (a) opposes thorough preparation for the Bar because they conceive in their minds that the necessary preparation becomes the privilege of the wealthy. The ultimate outcome of this view is that it is against the public interest to require any higher education for members of the Bar; and the reason they urge is this: It com-

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mits the error of assuming that only a rich man can get the necessary education to become a competent member of the Bar. They look further ahead than do the ones taking the individualist view, and state it would bring about a condition of social exclusiveness. But this group recognizes that the public has need of lawyers, which the group I first mentioned does not recognize. They contend the public has no such need. They think the Bar is simply some occupation by which some people can make a living, and they do not wish to deprive the poor of any opportunity to make a living.

However, the first group in this second category does recognize that the public has an interest in the education, training, character and efficiency of its lawyers; and they say, society cannot effectually be carried on without lawyers; and for that reason they think lawyers should be representative of every class in the community; that is, we should have, not educated lawyers solely—but we should have also poor lawyers, bad lawyers, uneducated lawyers; and they think they support their proposition by the statement “these men can speak for the classes from which they come.” Is not this equivalent to advocating that an ignorant man should have an ignorant man to “represent” him as a lawyer. Their view must take that form if baldly stated. They themselves might not accept this statement of their views. They might urge that well-educated lawyers must of necessity come from what is styled “the aristocratic class”; and they conclude “therefore, the public needs would be warped in their solution by this single class in the community.”

The fourth class recognizes that the public has a vital interest in its legal class. They recognize that the legal class performs two functions; one, that of representing clients; and, two, the function of guiding community growth along proper and rational lines. These think—and quite correctly—that to perform both functions or purposes it is undeniably in the public interest that lawyers should be well educated men. Uneducated men, men of immature minds, men of bitter prejudices and men of class animosities are unsafe guides of a community, as well as unsafe representatives for their clients. Their judgments are warped; their vision is narrow; they are too apt to act along lines of prejudice and in ignorance of historical precedents.



Hence, it seems established rationally, that the community needs the best attainable; but it should not prescribe requirements that would defeat its own ends by so limiting the number of men admitted to the profession that they could not perform the public function that devolves upon them. Standards should not be placed so high that the number attaining to membership would be limited so they could not perform the functions of the Bar. Anything short of that is, in my judgment, in the very best interests of the community; and it is axiomatic that you cannot have lawyers too well educated.

Chairman McAdoo:

There are three important topics to be discussed, and I find that there are only 75 minutes remaining. The Chair therefore suggests that an allotment of 25 minutes be made to each one of these topics. I hope this is agreeable, and unless there is objection we will proceed upon that theory. I hear no objection and so we will allot 25 minutes to the discussion of each of these topics. The next topic is the failure of the law office to give an adequate technical education.

The following paper prepared by George E. Price, of West Virginia, was then presented:

The question which I have been requested to discuss is whether an adequate legal education can now be obtained by a student in a practicing lawyer's office. What I have to say upon this question is, of course, largely the result of my own experience and observation; in fact, a man can only discuss matters of which he has had some personal knowledge and experience.

It is well known that many lawyers of the past generation and quite a number who are still living and in practice, obtained all their legal training prior to their admission to the Bar, without having the advantages of a law school. This is so in my own case. My whole training for the Bar was obtained by study under a great uncle of mine, a retired lawyer, a man of culture and learning of the old school. He had little to do except to direct my studies and quiz me upon what I had read, and discuss with me the legal and fundamental principles involved. Whatever success, therefore, I have had at the Bar, has been attained without the advantages of legal training in a regularly consti-

tuted law school—and this may be said also of a large number of the most eminent lawyers of the past in this country. Therefore, it cannot be denied that, as applied to the past generations and to those still living who were trained 40 or 50 years ago, it was possible to obtain adequate legal education in a lawyer's office or under private tutelage.

But, times have changed, and the methods of education in all lines have changed with the times. There have been, perhaps greater changes in the laws and in the methods of acquiring legal knowledge than in almost any other profession or avocation.

I studied law in Frederick City, Maryland. Frederick City was a substantial town of 12,000 or 15,000 inhabitants, located in one of the richest and most beautiful agricultural sections of the eastern part of the United States. It had a strong, well-educated Bar—if I should mention the names of some of the lawyers at that time, they would be recognized as leaders of the Bar of the country. As I recollect it, the legal business at that time consisted mainly of the settlement of estates, preparation and construction of deeds and wills, occasional actions involving land titles, actions of trespass and other torts including a few personal injury suits, suits relating to commercial contracts within what would now be considered narrow limits, and the usual limited criminal practice such as exists in that kind of a community. There were several law students or clerks in the lawyers' offices. It was the habit of all the lawyers to attend the session of the court at least part of the day. They frequented each other's offices, and met each other in the clerk's office or gathered in groups in the court house square in good weather. All took an interest in any important case that was pending and the questions involved, as well as politics and governmental affairs, were discussed. Forensic oratory was cultivated and elaborate arguments were permitted and were indulged in both before the court and the jury. The students in the law offices got the benefit of these free discussions of important questions of law, and of the dominant political issues and constitutional principles by men who were thoroughly competent to discuss them and who had sufficient leisure to enable them to keep abreast of the times. In those days the average lawyer had the

time and he made it a part of his practice, so to speak, to supervise the studies of the law student in his office.

In those days there were no stenographers employed in law offices. The typewriter was almost unknown, as I recollect it, and the pleadings and deeds and legal papers were written out in long-hand, either by the lawyer himself or by the clerk in his office. In this way the clerk or student got the benefit of the actual preparation of legal papers.

The lawyer was a man somewhat apart. He was a public man, a servant of the public in a much larger sense than he is today. He was recognized as a leader and adviser of the people not only in legal matters, but in all public matters and he rightly regarded his position as one of great responsibility.

So it will be seen from what I have said, that it was possible for a student in a law office not only to obtain an adequate legal education, but to acquire the spirit of the law and absorb the higher sentiments of the leading men in the profession and in the community. He was educated, not only in the principles of the law, but he could get the spirit of the American lawyer of that day; and this he could get in almost any community in the different states of this union. I, of course, can only speak of Maryland, Virginia and West Virginia; I know this was the situation in those states for the period succeeding the Civil War and up to 1875.

But there have been great changes in this country and in the world since those days. Of course, the courts had before them at that time many questions growing out of the Civil War, the readjustment of the rights of the states, and other great questions. But there was then but little development of corporate organization, such as we know it today. This phase of business developed rapidly, however. Its most important phase was the development of the great railroad corporations, their predominant influence in business, and their attempts at the control of political affairs, their discriminations between individual shippers and between different communities in the matter of rates and shipping facilities. This led to the agitation of the control of the railroads by the state, and the general government. It led to the discussion of questions of Interstate Commerce, of the powers of the general government as compared with

the powers of the states in the regulation of railroad traffic. Laws were passed for these purposes and there was great litigation over these questions; and finally the law took the form of providing for railroad commissions, and the Interstate Commerce Commission was created by the federal government, and the different Public Service Commissions were created by the states. These commissions were given control not only of the railroads, but of all other public service corporations. The questions as to how far the legislature could delegate its powers to a commission of this kind, and what was the scope of the powers of these commissions, and how far their decisions were binding, engaged the attention of the Bar and the courts throughout the country.

Then the great development of the wealth of the country led to the concentration of it by corporate organizations into what were known as the great industrial trusts. The word "trust" took on a new meaning, it really represented a feeling of "distrust" in the eyes of the public representatives in Congress and in the state legislatures. The great combinations were legislated against and the courts were called on to define their limitations and their activities or to dissolve them.

With the combinations of capital came, on the other hand, great combinations of labor often led by radical leaders attempting to enforce their demand not by means of the courts or other agencies of the government but by their own power—by strikes, tying up the great industries in which they had been employed, refusing to work with any one not a member of the union and producing a condition of terrorism by violence and destruction of property. Thus arose an attitude of antagonism on the part of the labor organizations against the organizations of capital. Out of this came what is known as collective bargaining.

The legislatures and the courts have had to deal with this troublesome and dangerous situation. How far can these combinations be controlled by law? Is the organization liable for the acts of its members? What control have the courts over these matters? How can these collective bargains be enforced? Is compulsory arbitration possible?

There has also been established by law what is known as the system of Workmen's Compensation, doing away to a large extent

with actions for personal injuries received by men in the course of their employment.

Within the time under discussion the gas engine has been invented, making possible the automobile and the aeroplane, also the great development of electricity, chemistry, the telephone, wireless telegraphy and many other inventions which have almost obliterated space and brought communities and the nations of the world closer together and making for better living and higher standards of all kinds.

Out of all these and many other things that might be mentioned in the economic world, has grown up an immense body of law unknown 50 years ago. This astounding expansion of the law has made it necessary for lawyers to acquaint themselves with a thousand things that the man of a past generation knew nothing of. The new statutes governing these questions fill many a volume, and the decisions of the courts have accumulated in such a way that it is impossible for anyone to keep in touch with them by anything like original investigation. In 1870 there were only 60 volumes of the Virginia Reports, covering nearly 100 years, now there are more than 120; West Virginia had five volumes, now 88; the Reports of the Decisions of the Supreme Court of the United States at that time were contained in 80 volumes, now there are 254; and this expansion has taken place to an even larger extent in many of the states of the union. So great has been the increase in the statute laws and in the law reports, that it has led to a large number of compilations so as to bring the body of the law within the reach of the practicing lawyer. Every lawyer is now familiar with the "American Decisions," the "American Reports," the "American State Reports," the "Lawyers' Reports—Annotated" with its several series; the compilation known as "Ruling Case Law" and "*Corpus Juris*," the various encyclopædias of law and procedure in pleading and practice; the digest and Annotated Reports; in addition to the Reporter systems covering the various sections of the United States. None of these existed or were needed 50 years ago.

I have endeavored in this brief way to indicate something of the scope of the labors and the field of the activities of the modern lawyer.

He is no longer a man apart; in fact, he is merely an integral part of a great moving system. To be effective he must keep in touch with these rapid developments, both in the economic and political world and in the field of the law. He is obliged to keep up some knowledge of the trend of the decisions of the courts. He no longer employs a mere clerk or student to prepare his papers. He dictates his papers to his stenographer and they are reproduced, and manifolded, upon the typewriter. He has but little time for anything else during his office hours except business; that is, if he is a competent lawyer and has attained to any responsible success in his profession. If he has not, then he could not make a very satisfactory tutor or instructor of a law student. He no longer sits in the chair in front of his office and discusses politics and public affairs. He no longer resorts to the court house and listens to the trial of cases in which he is not interested. When his office work is done, he seeks recreation in his automobile; his family demands that he take some part in social activities. There is no chance for his giving any attention to the training of young men in his office for the Bar. Instead of having a young man prepare his legal papers, it is now done by a smart young woman who has no aspirations for the Bar.

Now, what is the result of all this. The result has been the building up of law schools in almost every state in the country, the gathering of the young men who are studying law into the universities where they can give their whole time to the study of the law under highly educated and trained instructors specializing in the various branches of the law, and giving them the benefit not only of the fundamental principles of the common law as it was 50 years ago, but also of the developments which have taken place since then and of the trend and tendency of modern legislation and constitutional government calling attention to the latest decisions of the courts, and especially developing and analyzing the great fundamental constitutional principles upon which this free government of ours is founded. Thus, by the association with other young men from various parts of the country, by the influence and training of cultivated, patriotic lawyers directing their attention to certain specialized branches of the law, the young man is able to acquire such a legal education as will fit him for the strenuous, exacting duties of a practicing lawyer in

these modern days; and in no other way can it be obtained, in my judgment.

The result of what I have said is that the practicing lawyer who amounts to anything has not the time nor the inclination and is not competent to give to a law student in his office, adequate legal training. He is not competent because it is impossible for any lawyer nowadays to acquire and keep in mind a knowledge of the development of the different branches of the law so as to be able to impart it to others. We are obliged to specialize more or less, even where we have a general practice. We have certain classes of clients, and our attention is directed along certain lines. We become proficient in corporation law, in the law relating to railroads, in admiralty; or with us in West Virginia, in that branch of the law relating to the development of our coal mines, our oil and gas territory, and these things constitute almost a branch of the law of themselves. We must study the law of electricity and railroad law. Questions of Interstate Commerce are pressing upon us in our State of West Virginia constantly. Consequently, if the lawyer is engaged in practice along these lines, and he is employed in a case of a different character, he is obliged to go to work and revise his studies upon the new questions and ascertain what have been the more recent decisions governing it. It is not sufficient to go back to Kent, and Blackstone, to Chitty, and Greenleaf on Evidence; and he has not the time to keep up a comprehensive knowledge of all the branches of the law. But, in the law schools the different professors take different branches of the law, and the students have the benefit of their specialized knowledge. This immensity of the law reminds me of the old incident of the young fellow in Alabama who applied for admission to the Bar. The committee that was appointed to examine him, quizzed him for some time before dinner, and then after dinner when they were about to resume, the young fellow told them that he had made up his mind not to go any further with it. When they asked him if he was going to give it up, he answered, "Yes; the law was very easy, but there's too damned much of it." If that was so in those old days, how much more is it true today?

I have mentioned before the manifest advantages of a student who has had the benefit of training in one of our great law schools, as over one who had the kind of training that one gets in a law

office. These young men come back after their three or four years' course in the universities with a comprehensive view of the law and especially with the training that enables them to find out what the law is and go to its sources and analyze, and brief it. They can do their work much more easily and accurately than the lawyers of the old days.

The conclusion, therefore, is inevitable; that it is now almost impossible for a young man to acquire an adequate legal education simply as a student in a law office; but the provisions that are made for education in the law schools in nearly every state in the union, the facilities for travel, and the helping hand that is always held out to the worthy young man, render it possible for almost anyone to obtain the necessary legal training under competent professors in these schools. And very few who have the mental and moral qualities necessary to make real lawyers will be prevented from obtaining admission to the Bar by the requirement of a reasonable course of training in a law school.

Chairman McAdoo:

Attorney General Wickersham will introduce the discussion, and it gives me great pleasure to introduce a former distinguished Attorney General of the United States, George W. Wickersham.

George W. Wickersham, of New York:

I confess I am somewhat at a loss to know how to discuss the subject which has been presented by Mr. Price, "The Failure of the Law Office to Give Adequate Legal Training." The statement of the topic involves a recognition of the failure of the old system of legal training. The rapid increase in the number of law schools and in the number of students attendant upon them is in itself proof of that failure.

Is not the cause of this fact to be found in those changes referred to by Mr. Root in his address to the American Bar Association at Cincinnati, when he said:

"The vast multiplication of text-books appointed reports of adjudicated cases and of statutes, has been already so great and is proceeding at such a rapid rate, that it is plain that the study of the law and the knowledge of the law and the application of the law today are widely different from anything that existed 50 years ago."



Historically, in England, office instruction was confined to the apprenticeship of solicitors' clerks. Several years drudgery in an attorney's office was necessary before one could become a member of that branch of the profession which dealt with the mechanical or business phases of legal matters. The Bar—that is, those entrusted with the conduct of causes before courts and the giving of legal opinions on questions submitted by solicitors composed of the members of the Inns of Court was recruited nominally from those in reading law in the office of the barrister. The real work of preparation for the Bar came after admission by constant attendance upon the great legal clinics—the courts. As a rule, by force of tradition and class distinction, those who were admitted to the privilege of reading law with barrister were university graduates—gentlemen. Their actual legal training was acquired by service as devil or junior counsel and by observation acquired through attendance upon the courts.

In the early days of our republic prevailing conditions made impracticable the separation of professional work between solicitors and barristers; there wasn't enough work to justify such a partition of effort. And the method of qualifying for the Bar naturally was through the office of a practising lawyer. In general this was unsatisfactory. Joseph Stone has recorded his experience in the office of Samuel Sewall which he entered in 1798. He was thrown on his own resources and attempted to read Coke on Littleton with Butler and Hargraves works. "After trying it day after day with very little success," he says, "I sat myself down and wept bitterly."

William Wirt, after a perfunctory examination, was admitted to the Bar a "a full-fledged" lawyer, with limited knowledge of the law, no particular resources, and a small but characteristic library, consisting of a set of Blackstone, two volumes of Don Quixote and a copy of Tristram Shandy.

That these men overcame the obstacles of imperfect unsystematic instruction, only demonstrates their extraordinary capacity to grapple with any adverse condition and to compel success at any cost.

The success or failure of a law office training depended upon the lawyer and the character of his practice. If he were a conscientious preceptor and took the time and pains required to

guide the student and supervise his studies and if his practice enabled him to use the student in the preparation of his cases and in the incidents of court work, the result might prove fairly adequate. But I think the greatest value a student get from the law office method was the inspiration of association with some great and inspiring personality.

After all, more important even than education in the learning of the law is the formation of character and the development of standards of personal and legal ethics which require no teaching of artificial codes of conduct, but which develop an instinctive knowledge of right and wrong, rendering impossible the toleration of any conduct that is not straightforward and honorable.

Such standards are best acquired through association with honorable and respected men. Such association is as necessary in a law school as in an attorney's office. It was the personal character of Ames and Gray, Thayer and Jeremiah Smith—to speak only of the departed—quite as much as the superior method of instruction, that made the Harvard Law School pre-eminent. It was the character of E. Coppee Mitchell and Judge Thayer, professors at the Law School of the University of Pennsylvania, that made a deep impress upon the students of my time who came under their influence.

The law schools became necessary because the growth and complexity of modern law made it impossible for a successful practitioner to give the time and attention to his students necessary to fit them to enter upon the profession when so much more was required than had been the case in earlier years. But the success of the law school will be determined, not merely by the scope of its courses or the thoroughness of its instruction, but by the character of the teachers. They must be able to inspire their students with the highest professional ideals and the most simple unswerving principles of right living. Mere learning or cleverness will not suffice. The universities must seek men of inspiring character for their professorships, those positions in which great and far-reaching influence may be exerted upon the young men of succeeding generations.

As I have noted, by tradition, the English Bar largely was recruited from graduates of the universities. What tradition effected in England, the influence of the Bar must compel in this

country. An increasing number of uneducated men are crowding into the legal profession in our large cities. I cannot speak from knowledge of the rural communities. But the rules in my own state, applicable to all portions of the state, permit entrance to the profession by men with ridiculously slender qualifications. The law would soon cease to be a learned profession were these standards to be maintained. No other country in the world permits men to become lawyers with such a meagre educational foundation as is fixed in the statutes and rules of the greatest commercial state of our union.

It is high time the American Bar organized in defense of its best traditions and moved towards a reassertion and reestablishment of its best ideals.

During the last seven years and a half I have served as a member of the Committee on Character and Fitness appointed by the Appellate Division of the Supreme Court in the First Judicial Department of New York. Our state is divided into four judicial departments and the first embraces the counties of New York and West Chester. That is the division into which, by far, the greater number of the students who apply for admission to the Bar, make their application. I have not the figures here, I wish I had, to tell you how many men have come before that committee. But I can generalize, without speaking accurately, as to figures respecting the problems that we have had to deal with. I listened with interest to Mr. W. B. Hale, of Chicago, yesterday, as he spoke of the difficulties that the Illinois Committee has to deal with. I presume our problem is worse than that of any other part of the United States because, of course, into New York comes streams of immigration from all parts of the world. In the first place the reasons for leading men to endeavor to become lawyers are interesting. In probably 90 per cent of the continental born who apply for admission, the motive is the effort at social advancement or preferment. In the country from which they come the advocate occupied a higher social position than his fellows. Therefore, quite naturally and quite commendably, their parents inspire them with the desire to advance in the social scale, and they catch at the idea quite quickly, and the easy way to get on and become an advocate is to follow the disgracefully easy path open by the statutes and the rules of

court in New York to enable men to become lawyers. They are not required to have a college education, they are required to pass an examination in certain subjects, an examination conducted by the state university. The theoretical requirements are ridiculously low, and in the method of carrying them out we have had strong reason to seriously complain. Then they go to some part-time law school. The less education they have the more they seek the law school that offers them the easiest method of qualifying for the Bar. And for a long time the Bar examiners appointed by the Court of Appeals confined themselves largely to requiring the exercise of feats of memory and many of these men have extraordinarily acute and retentive minds and they can learn any arbitrary rule that is laid down for them. I am happy to say that recently the situation of the Bar examiners has been changed and we now have a body of young men fully alive to the needs of the situation and desirous of cooperating to the fullest extent with the local authorities in making the examination for admission to the Bar a test, not merely of memory, but of the reasoning faculties.

Now there are one or two things that very notably impressed themselves upon us. Most of the men who come from the Continent of Europe, and that is largely those who come from Russia and Poland and Austria and Southeastern Europe—very few come from France and comparatively few from Germany, that is, from Germany proper—most of those men, and I speak now of what we had before us up to perhaps six months ago, and before the new committee of Bar examiners had really got set, taking the examination in two parts, the examinations are divided into examinations in substantive law and examinations in adjective law. Generally those men passed the examination because of the arbitrary rules which they can memorize, such as laws of procedure, laws of evidence, statutory requirements. They pass those examinations the first time. They seldom pass an examination in substantive law the first time. They take one, two and sometimes three examinations in substantive law. My associates and I have been convinced that in a very large percentage of the cases they never get through their heads a conception, an adequate conception, of the spirit and meaning of the English law which underlies our system. They come from a

different environment, they are products of a totally different system of thought and training, and they never do come into full realization of the meaning of our law historically, the history of its growth, its development and its significance, and it is an appalling thought to think of some of those men coming, as they do, and getting into political life, coming ultimately to be judges and interpreting the law, becoming legislators, making and altering the law, to think that those men, with their imperfect conception of our institutions, should have an influence upon the development of our Constitution, and upon the growth of American institutions, is something that I shudder when I think of.

This condition, undoubtedly, is worse in New York City than it is in some of the other places. But I have no reason to think it is much better in the rural communities. I have no reason to think that things are materially better there than they are here. Now, how are we going to combat it? The law office instruction has, as has been stated in this topic, proved a failure. We must insist, at all events, upon a basis of general education adequate to our needs upon which to build, fulfilling the requirements of professional instruction, and then we must see that so far as possible the organized law schools model and adapt their courses so as to give the best possible professional education to men coming on to the practice of the law, and I, for one, have no fear of requiring a three years' course in a law school, because these very men that I speak of are the ones who will get that education. They get through now on the minimum requirement; they will always manage to secure the minimum requirement, but in the process they too will be modified, and they too will be improved in the final hour.

Chairman McAdoo:

I have pleasure in introducing Thomas Patterson, of Pennsylvania.

Thomas Patterson, of Pennsylvania:

I trust I have your sympathy, because I was asked to come here to present certain views against the resolutions of the American Bar Association, and in addition to the unpleasant position of being *advocatis diaboli* I am also limited to seven minutes. Therefore I shall satisfy myself with a statement of my position.

I conceive it the right and the duty of the court and Bar to insist upon certain qualifications before a man shall enter upon the public profession of the law as a practitioner. I deny their right to determine the means by which he shall get those qualifications, unless there is some reason so absolutely persuasive and overpowering as will necessarily lead to that result. Then I say that the man without the means, without the possibility of pursuing a college course or law school course, has the right to prepare himself in his library and his office for admission to the Bar and to practice law and to get not only the professional emoluments that come from such practice, but those positions of public trust to which the profession of the law is the opening door.

Now, just why is it that you believe the law school has this priority over the office lawyer? Certainly not from the history of the past. A Bar that has had a Gibson and a Shaw and a Jeremiah Mason needs no apologies to the Bar of today as to its ability, and today practicing at the Bar are men without these qualifications of as high standards and as much knowledge as any graduate of law schools.

I am going to quote some figures, taken from the records of the State Board of Law Examiners. I may say that I have been a member of this board for 15 years.

One law school—I shall not mention its name—has a most wonderful record. From 1905 until 1915 only 1.5 per cent of rejections occurred, and since 1915 only 7 per cent. Then those figures drop as we come to the inferior law schools until we find 60 per cent of rejections. In the average law school—this is taken from all sources—42 per cent failed upon the first trial.

Now, of your office men, 33 per cent failed. In other words, those who come from the office are apparently about as well prepared so far as the examination is concerned as the average that come from the law schools. But so far as the very interesting thought Mr. Root gave us of the great moral benefit gained by college training, may I suggest that that is not by any means certain, that there is good reason to believe that in many of the universities radicalism and socialism is very widespread. I know it is so in certain colleges. I have sat on the platform of a large institution where there were 6000 undergraduates and I have

looked at their thin faces, their undernourished bodies, their heavy expressions, I have turned and said "How many of these students are studying the classics?", and the reply was about a hundred.

In closing, may I suggest to you that this is a subject in which we are all equally interested. If you have boards of examiners, trust them and insist on their efficiency. If the requirements should be higher, make them higher; but most of all make your preliminary examination include the classics, because my experience, connected as I have been with the profession and as a professional examiner for six years, has been that there is a heavy, persistent urge to take the classics out of the preliminary examination for registration, and although the law school becomes and is becoming, in the natural course of competition, almost an exclusive training school, the student also should be required to register with a reputable practitioner in order that his life may be known. Nothing is less known than a man who attends a foreign law school and comes back with his diploma. But if he is required to be registered with some man of repute and if he is required to pass the examination in this great mental and moral training of the classics, I think the question will answer itself and the improvement will come. I thank you for hearing me.

Chairman McAdoo:

The next topic is "The Part-time Law School and its Place in Legal Education." This topic will be introduced by Mr. Frank H. Sommer, of New Jersey.

Frank H. Sommer, of New Jersey, then read his paper:

Hesitation, due to a keen appreciation of the difficulty of the task, marked my acceptance of the invitation to present in the brief space of 15 minutes "The place of the part-time law school in legal education."

Hesitation was, however, overcome by the manifestation of faith, implicit in the invitation, in the power of intensification in exposition developed through instruction in a part-time law school.

It will be my effort to justify that faith. In doing so I shall refrain from disturbing the peaceful rest of the beloved Lincoln which was so frequently broken in upon yesterday.

At the outset it should be said that the views here expressed are personal, and are not to be taken as representing or reflecting the opinions of my colleagues in the faculty of the school from which I come.

The place of the part-time law school in legal education is that of an institution which affords an opportunity through systematic, supervised study, to acquire that thorough and rounded equipment in knowledge of the principles of technical law and the ability to apply such knowledge, which is essential to, and without which no one should be entrusted with, the discharge of the functions of a lawyer, advising, with the sanction of the state, as to legal duties and rights involving life, liberty and property.

It is an institution which, in offering this opportunity, must, if it properly fills its place, stress not merely the function of logic and of precedent, but lay equal emphasis upon the fact that law is not an end in itself, but a means to an end, and that expediency does and must play a part in its development both through adjudication and legislation; that law is not "inspired dogma" but "an instrument of progressive social engineering."

It is an institution which, in affording this opportunity, must, if it properly fills its place, so conduct its work as to sink deep the roots of conviction that the practice of law is not a trade; not merely a profession, but a public profession.

I readily assent to the natural suggestion that this is the place of any school of law worthy of the name and whose goal is not merely to enable its students to meet the test of examinations for admission to the Bar, which in general are too low in the standard set.

Insofar I recognize no distinction between the place of the whole-time and that of the part-time school in legal education.

The whole-time and the part-time schools recognize, equally, that the law is a social institution; that it governs, and bears alike on all within the community, and that the formulation and development of law is consequently of equal concern to all; that such formulation and development must not be in the interest of any special class; and that in such formulation and development the interest of the whole must steadily be kept in view.

The part-time school because of these considerations, however, insists that conditions for entry into the ranks of those to whom



the formulation, application, and development of the law is entrusted shall not be set at a point that, irrespective of capacity, confines admission to the well-to-do.

It is in view of these considerations that the part-time school consciously arranges its classroom hours so as to admit of carrying concurrently the task of providing a livelihood and the systematic study of law.

This course is not inconsistent with the setting and maintenance of high standards.

It is dictated by the considerations stated and by them alone, and is not prompted by considerations basely commercial.

Though there may be those among them who have sinned against the light, the record of the part-time school in general supports these statements.

The part-time school has not been a laggard in the movement to bring about the setting of advanced standards for admission to the Bar by legislatures and courts.

In one state the advance in such standards is attributable almost wholly to the persistent and for a long time highly unpopular efforts of an instructor in a part-time school, whose answer to sentimental and demagogic pleas made to defeat the accomplishment of his purpose, was to point to the existence of the part-time schools and the opportunity afforded by them.

Not infrequently, too, the part-time school has boldly, ignoring financial considerations, advanced requirements for entrance and graduation beyond those set by the state for admission to the Bar.

In the light of this statement of the purpose of the part-time school and the attitude that it has assumed in the past on the question of advancing the standards of legal education and requirements for admission to the Bar, I confidently anticipate ready acceptance and support in principle, if not in detail, by those who are interested in the part-time schools, of the proposals of the American Bar Association and of the movement now under way to effect these proposals.

The proposed requirement of two years of study in a college in no way contravenes the principle on which the part-time law school rests and upon the maintenance of which it insists.

The inevitableness of this requirement some of the part-time schools have long recognized and have, without awaiting action by the state, provided for putting it into effect.

The effective study of law in the stage it has now reached, replete with the complexities and perplexities which mark a period of transition in which community interest is displacing individual interest in the spot-light of juristic thought, requires a broader and deeper background of fact, knowledge and cultural training than is afforded by a high school course.

That a wider and more definite acquaintance with English and American history, in particular, and of world history in general, the social and political sciences, social ideals and aspirations as expressed in literature, and with the processes of business than can be acquired in a high school course is, in this day, requisite to the effective study of law, one, who has struggled to teach graduates of high schools the principles of constitutional law and the principles of law relating to certain phases of social relations and business transactions, must readily concede.

The proposed requirements raise a necessary barrier to entrance of the unfit and inadequately trained into the profession.

This barrier presents, under present day conditions, no insurmountable obstacle to the man of average capacity unblessed by command of an overplus of this world's goods.

Colleges and junior colleges maintained as a part of the system of free public education increase in number.

A broader base of endowment for colleges not publicly maintained admits of a more liberal attitude in the grant of free and partially free scholarships to men of capacity.

In the great centers of population the part-time college is finding itself, offering an opportunity to carry along, simultaneously, work affording a livelihood and the pursuit of a college program.

The rise of the part-time college does not foreshadow the advent of an era of lowered standards of collegiate training.

It marks the dawn of a day of recognition of the need of adjusting educational programs so as to extend the opportunity to acquire advanced education to all who may be advantaged thereby.

Its rise marks a step forward in the "American experiment of government by the people through enlightenment of the people."

Years of experience have fixed, broadly, the content and limits of the college program; the methods of conducting it; and have established the average time demanded in thorough preparation of required class-room work.

It is upon this basis of experience that the typical college program extending over four academic years is framed.

Its mastery calls upon the student of average capacity to devote to that end substantially the whole of his working time, making reasonable allowance for those activities which are required to cool the warm blood of youth.

It follows then that the program of the part-time college substantially identical with that of the whole-time college must be, as it is, spread over a longer period of time.

The place of the part-time law school in legal education is identical with that of the part-time college in the system of general education.

Unqualified assent cannot, however, be given by the part-time law school to the proposal that every candidate for admission to the Bar should give evidence of graduation from a law school which requires its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in number of working hours, if they devote only part of their working time to their studies.

Unqualified assent to this proposal by the part-time law school requires preliminary consideration of certain factors in the law school problem and definite action with respect thereto.

A survey of the programs of instruction of the schools of law classified as whole-time schools in connection with Mr. Reed's admirable study—"Training for the public profession of the law," fails to reveal agreement as to the number of class-room hours per week thorough preparation for which will require substantially the whole of the remainder of the working time of a student of average capacity.

The number of class-room hours required by these schools rises from 12 hours per week. The variance is wide.

Some impose the requirement of prescribed collateral reading and examination based on such reading.

Some permit the taking of hours of class-room work in excess of the required number of hours.

Some permit the simultaneous carrying of other than technical legal subjects.

These considerations, together with my experience at the Bar and as a law instructor and particularly my observation of the results of an experiment in intensifying work in legal training which was made necessary by conditions arising out of the war, raise serious doubt whether the prevailing program of the schools so classified as whole-time schools, in general, requires in its mastery that the student of average capacity devote substantially all of his working time to his studies, unless "working time" is to be measured by a standard which each student may set for himself.

This doubt has not been lessened by observation of the progress of students who, without change in working time conditions, have passed in good standing from schools classified as part-time schools to schools classified as whole-time schools and from the latter to the former.

Nor has it been lessened by observation of numbers of students in the whole-time schools who apparently find no difficulty in mastering the required program and at the same time satisfactorily serving a clerkship or pursuing more gainful occupations.

This doubt has been strengthened by the fact that students in schools classed as part-time schools which maintain a program substantially identical with the prevailing program of the whole-time schools, which set examination papers which compare favorably in searching qualities to those set by the whole-time schools; papers judged by instructors trained, in many instances in whole-time schools; have in great numbers mastered the program without devoting "substantially all of their working time to their studies."

Consideration has resolved the doubt into conviction that the prevailing law school program does not demand in its mastery that the student of average capacity devote substantially all of his working time to his studies during a period of three academic years.

I am, however, also convinced that a program adequate to prepare for efficient practice of the law under the conditions of this day and of the future will require that the man of average capacity devote to its mastery substantially all of his working time through three academic years.

If I am not mistaken in this conclusion as to what is and what should be, it follows that the standards set in examinations for admission to the Bar must be radically advanced and made a test of the successful pursuit of a course of studies which makes this demand upon student effort. It further follows that the prevailing program in whole-time and part-time schools requires revision.

Since, by the admission of all, the house of the law needs setting in order, the readjustment should have that quality of thoroughness which differentiates the spring cleaning of the good housewife from that of the sloven.

With such a revision of the prevailing program the whole-time school will offer opportunity for adequate legal training to those students who are not under the necessity of engaging in other occupations and who are therefore able to devote substantially all of their working time through three academic years to the pursuit of their studies, and will in fact as well as theory uniformly demand of its students that measure of study; while the part-time school will offer a like opportunity to those, who, because of economic conditions, are compelled to engage in other occupations requiring a substantial part of their working time while engaged in the study of law.

The offer of this opportunity by the part-time school will then of course involve the spreading of the required hours of classroom work over a longer period of time than is covered by three academic years; the extended period being governed by the "free time" for study.

If the suggested revision of the tests for admission to the Bar, and of the prevailing program of instruction in schools of law is made, unqualified assent may be given to the proposed requirement.

The adoption of the suggestions made will, I submit:

(a) Advance the standards for admission to the Bar and measurably guarantee that the holder of the state's license to practice law is adequately trained to deal with legal problems.

(b) Raise the standards of both whole-time and part-time schools of law to a point that assures in greater degree than at present the turning out of lawyers fit to grapple with their problems.

(c) Produce a program of instruction that, shaking off the dead hand of the past, is adapted to present and future needs.

(d) Close the door of admission to the Bar to the unfit and inadequately trained, but throw the door wide open to the fit through the provision of facilities for adequate training adapted to the varying financial conditions of those capable of mastering these facilities.

Out of the conditions which will result from the adoption of these suggestions and through zeal to excel there will grow another and higher type of school of law—a school of law and school of jurisprudence combined—a combination that surely pedagogical vision can effect.

This school setting its admission requirement in advance of the requirement of two years of college work, will offer a program in law that in its mastery will demand substantially all of the working time of the student through four academic years; a program framed to equip for the practice of the law, and definitely for leadership in its formulation and development.

Out of the student body of this school may be expected to come teachers of law; authors of treatises on legal topics, not mere digests; from its ranks may be expected to be recruited men capable of performing the sadly needed task of simplifying and producing order out of chaos in the statutory law; to its graduates we may look to play an important part in the work of the rapidly multiplying administrative tribunals which are devising and applying a growing body of rules which have the force of law; from those it sends out, advice and counsel may be expected to be increasingly sought in litigation of social and economic import and in framing legislation to meet the social and economic problems of the new order.

To those who complete the work of such a school some distinction should be granted.

May I suggest that the admission to practice in any state of a man so qualified might well without more entitle him to practice in every other state; and that the rules governing admission to practice in the federal courts might well be revised so as to give

recognition in tangible form to such a degree of preparation for the practice of law.

Finally, need I say that in my judgment whether a school belongs in the class of whole-time or of part-time schools is not necessarily determined by the hours of the day fixed for class sessions, but by the demand in preparation which its program makes in actual execution upon the time of the student of average capacity.

I venture to hope, though mindful of the fact that I am merely your guest, that this Conference will approve the recommendations made by the American Bar Association in principle, but that it will at the same time insist:

(1) That the committee of the Association shall classify no law school as maintaining the standards prescribed in its recommendations without careful investigation not merely of the published program of instruction, but of the administration of such program as well, nor without requiring a statement as to the outside occupations and employments of its students and of the hours devoted to the same.

(2) That such committee shall not classify a school as not maintaining such standards without careful investigation nor without opportunity to the school to be heard.

(3) That in view of the inaction and lack of agreement upon the subject in the Association such committee permit the academic year 1923 to pass before it places the stamp of disapproval upon the work of any school and so afford a reasonable opportunity for readjustment.

And finally that such committee where the control of requirements for admission to the Bar rests with the courts, and the requirements for admission have been set lower than the standards now recommended, such committees give publicity to its disapproval of these courts like unto that disapproving publicity which it purposes to mete out to schools of law.

What is sauce for the goose is sauce for the gander.

Surely the responsibility that rests upon the courts is as great as that which rests upon the schools and Bar.

Public service, so forcibly stressed yesterday by the Chief Justice and by Mr. Root, in this connection, is not the obligation of the schools of law nor of the Bar alone.

It is equally the duty of the Bench.

Chairman McAdoo:

I have great pleasure in introducing Mr. Charles M. Mason, of New Jersey.

Charles M. Mason, of New Jersey:

Gentlemen of the Conference, I am a college graduate and I am also a law school graduate. At the present time I am dean of the New Jersey Law School. The greatest difficulty that we have had in that state has been with the courts. We have tried to have them make the time required in the law school four years. In the first place we have never been able to get them to require a candidate for the Bar to be a law school or a college graduate. He is eligible to examination by obtaining a certain number of counts. He is eligible to take the examination for admission to the Bar by spending three years in a law office. To a certain extent the time spent in a law office is a joke. I mean by that that the candidate for admission to the Bar is used as a runner, he is used for miscellaneous purposes, and largely for the reason that the salary to be paid him is very low. In some cases the old attorney tells the clerk that in his day he had to pay for the privilege of serving in a law office. We of the New Jersey Law School are willing to meet the requirements of two years. We think, however, it is merely a step. We do not feel that two years in a college, as most colleges are conducted and the courses that they offer, is going to cure the errors in the legal system. It is merely a step in the right direction, and that is all. We do feel, as a representative of a part-time law school, that the doors should not be closed to any class of American citizens. We do feel that the standard should be raised, that a high grade of American citizenship should be required of every candidate. We do feel that a high grade of scholarship should be required of every candidate; we do feel that a high grade of legal learning should be required. But we put the requirements back at the doors of the Supreme Court where it should belong and their requirement should be such that a candidate should show some evidence of being a scholar and a student.

Herbert S. Hadley, of Colorado:

I move that we suspend the printed program and that the next order of business be the production of these resolutions that we have heard so much about, but have not seen.



William Draper Lewis, of Pennsylvania:

As I am the next person on the program here, I want to say that I think that what this meeting wants is to have the resolutions that have been referred to produced so that every one will have notice of them and we can have, perhaps, some little discussion before one o'clock, and then the discussion can be continued when we meet this afternoon. I therefore second the gentleman's motion.

Chairman McAdoo:

I should like to make this suggestion, that I think it is very important, so far as it is practicable to do so, that we have a general discussion of these topics that have been discussed, and I would suggest, if it is agreeable, that instead of adjourning at one o'clock that we adjourn at one-thirty, which will give ample time for lunch, and be able to resume the session at two o'clock. Is that agreeable?

Mr. Lewis:

I so move, Mr. Chairman:

Chairman McAdoo:

I hear no objection, so we will adopt that course without putting it to the meeting. Now the Chair will entertain any resolution that you desire to present.

Mr. Goodwin:

I have been asked on behalf of the committee to present a series of resolutions which, so far as we are able to learn, appear to represent the sense of this meeting. I do not wish to debate them. I only wish to say that I think you will find within these resolutions an answer to many of the arguments offered here, offered with the thought that they were opposing the program as a whole. It is only to meet those suggestions that this resolution is put in the form that has been adopted. I think particularly with reference to the suggestions made by the gentleman from Tennessee, last night, that Article VIII of these resolutions fully meets the objections which he so eloquently made. I would like to say also a word upon the scope of this Conference. Some objections have been made which really do not go to any

suggestion of action here, or anything germane to the purpose of this Conference, but only relate to the propriety or impropriety of certain actions taken by the American Bar Association with which we have nothing to do. This meeting of the Conference is merely for the purpose of uniting the bodies represented in an effort to create conditions favorable to the adoption of the principles above set forth in the resolution. This is not a resolution that these rules be put instantly in effect, but it is presented as a means of creating conditions that will permit the different states of the union to put them in effect.

Without further comment, and with your permission, I will read the resolution:

*Resolved*, That the National Conference of Bar Associations adopt the following statement in regard to legal education:

1. The great complexity of modern legal regulations requires for the proper performance of legal services lawyers of broad general education and thorough legal training. The legal education which was fairly adequate under simpler economic conditions is inadequate today. It is the duty of the legal profession to strive to create and maintain standards of legal education and rules of admission to the bar which will protect the public both from incompetent legal advisers and from those who would disregard the obligations of professional service. This duty can best be performed by the organized efforts of bar associations.

2. We endorse with the following explanations the standards with respect to admission to the Bar, adopted by the American Bar Association on September 1, 1921:

Every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

- (a) It shall require as a condition of admission at least two years of study in a college.

- (b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.

- (c) It shall provide an adequate library available for the use of the students.

- (d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

3. Further, we believe that law schools should not be operated as commercial enterprises, and that the compensation of any officer or member of its teaching staff should not depend on the number of students or on the fees received.

4. We agree with the American Bar Association that graduation from a law school should not confer the right of admission to the Bar, and that every candidate should be subjected to examination by public authority other than the authority of the law school of which he is a graduate.

5. Since the legal profession has to do with the administration of the law, and since public officials are chosen from its ranks more frequently than from the ranks of any other profession or business, it is essential

that the legal profession should not become the monopoly of any economic class.

6. We endorse the American Bar Association's standards for admission to the Bar because we are convinced that no such monopoly will result from adopting them. In almost every part of the country a young man of small means can, by energy and perseverance, obtain the college and law-school education which the standards require. And we understand that in applying the rule requiring two years of study in a college, educational experience other than that acquired in an American college may, in proper cases, be accepted as satisfying the requirement of the rule, if equivalent to two years of college work.

7. We believe that the adoption of these standards will increase the efficiency and strengthen the character of those coming to the practice of law, and will therefore tend to improve greatly the administration of justice. We therefore urge the bar associations of the several states to draft rules of admission to the Bar carrying the standards into effect and to take such action as they may deem advisable to procure their adoption.

8. Whenever any state does not at present afford such educational opportunities to young men of small means as to warrant the immediate adoption of the standards we urge the bar associations of the state to encourage and help the establishment and maintenance of good law schools and colleges, so that the standards may become practicable as soon as possible.

9. We believe that adequate intellectual requirements for admission to the Bar will not only increase the efficiency of those admitted to practice but will also strengthen their moral character. But we are convinced that high ideals of professional duty must come chiefly from an understanding of the traditions and standards of the Bar through study of such traditions and standards and by the personal contact of law students with members of the Bar who are marked by real interest in younger men, a love of their profession and a keen appreciation of the importance of its best traditions. We realize the difficulty of creating this kind of personal contact, especially in large cities; nevertheless, we believe that much can be accomplished by the intelligent cooperation between committees of the Bar and law school faculties.

10. We therefore urge courts and bar associations to charge themselves with the duty of devising means for bringing law students in contact with members of the Bar from whom they will learn, by example and precept, that admission to the Bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service which they are bound to maintain.

Julius Henry Cohen, of New York:

Speaking on behalf of the committee, as I have been delegated to do, I may say that it was the purpose of the committee not to project its own views upon this Conference, but to furnish the opportunity for the American Bar Association to present the views in support of the standards that have been approved by that Association, and to give the kind of discussion in this Conference that has taken place at all their meetings of the Conference of Bar Association Delegates. We keep in mind that we come here with no warrant to commit our associations, that many of the

delegates differ among themselves, that we are here merely, as far as we can, to aid in formulating public opinion of the Bar. With that in view the committee has invited, through the correspondence that it has received, speeches and addresses from all sides of the question. The subject is now before the house.

Before any addresses are made in criticism or in support of the resolutions that have been offered, I should like to direct the attention of the Conference to the language of the resolution. These resolutions have been drawn after a very careful discussion in the committee, and with the hope that they will secure the unanimous acceptance of this Conference. When you come to study the language of these resolutions you will see that the committee accepts nearly all of the propositions that have been advanced in negation of the resolution of the American Bar Association.

What are those propositions? The first sets forth that while we may have an aristocracy of education, an aristocracy of learning and a leadership in the community which the Bar may fulfil, that we cannot have a Bar that is open only to men of breeding, of inheritance or of tradition or men coming from only one part of the world. In that connection, may I say that I should find myself on the opposite side of these resolutions if there were any attempt at all to exclude the men of modest means or to exclude the son of the immigrant. And let me say at once to those who are here from the south and middle west and the far west that those who come from New York City and New York State have all made that qualification to Senator Root's address and to Mr. Wickersham's address this morning. One of the most distinguished teachers of law at one of the great faculties is a graduate of Senator Root's office, a trusted lieutenant of his when he was Secretary of War, and a son of one of these immigrants to which Mr. Wickersham referred today. One of the ablest young men I know in New York is a junior in a firm which now, by consolidation, has at its head one of the most scholarly, one of the most dignified men at the Bar, and one of the ablest men at the Bar. That young man won the Philipson Scholarship and is a son of a continental immigrant. Another has been the trusted associate of the man whom I believe to be the ablest constitutional lawyer in this country, and he will tell you that in his long career at

the Bar there was no man whom he would trust more, both on the intellectual side and on the moral side, than that gentleman. I beg that you will not believe that there is anything in the statement made by either of the eminent gentlemen from New York to alarm you over the conditions of the New York Bar resulting from the fact that men who are descended from European immigrants are going to ruin the standards of the Bar. I could not vote for these resolutions if I so interpreted them. Moreover, let it not be understood abroad that the purpose of these resolutions is to confine the Bar to those who believe in one system of legal jurisprudence. We know too well, those of us who know anything about the practice in Louisiana, that we have already succeeded in borrowing from her continental system, and we will continue to borrow. One of the speakers this morning referred to the fact that the universities are crowded with radicals. The provision of college education is no guarantee that our system of law is going to continue in its present form. But the committee believes that the essential point upon which we, as lawyers, must all agree is that the lawyer shall have the tools of his trade, and that the tools of the trade are not merely knowledge of the law, but knowledge of those subjects which ordinarily can be secured only through university training, which makes for an understanding and development of the law. We are too prone in this country and in this day to assume that the lawyers' work ends in finding the statute and the case on all fours. That is not so. The true function of the lawyer—and here I differ with Mr. Byrne—is in the public capacity in which he serves the client. The lawyer, in the handling of a case in court, is making for a precedent in the law which shapes the law as a matter of public policy. And over and over again we have found errors traditional in the law, brought about by some of the judges in this country, due to lax studying of English precedent, due to the fact that there has not been sufficient research and sufficient understanding of the historical background, and that error has been repeated.

Our Court of Appeals has, within three years, reversed itself on important constitutional questions because of the fact that the presentation in the second case was more complete than in the first. The lawyer of today must not only have a historical background, must not only have the training to enable him to analyze

the precedents, but he must have the knowledge of the sciences which will enable him to present those facts of which the court is supposed to take judicial notice, but of which it has not enough actual notice until it is presented to them by the trained advocate.

Now every man who has had the misfortune to own an automobile knows that the kit of tools that is carried under the chauffeur's seat will not take care of his car. If he has any kind of a garage or does his own work he knows that to vulcanize his tires or even take the carbon out of his cylinder he has got to have a whole garage full of all kinds of tools. I have one ideal, and only one ideal, among the men whom I have met, who, in the practice of the law, has all the tools requisite. I am glad that he is not in the audience so that I may mention his name. The only man at the Bar—and I am not speaking now of native shrewdness, although every one will admit that this gentleman has that in very large measure—but the one man whom I have met in all my contact with the American Bar who satisfies the requirements of having a complete kit of tools is Mr. Hampton L. Carson, because he knows the history of all the important statutes, the history of all the important decisions and has the background of training that enables him at almost a moment's notice to turn to what he needs. That is my ideal of a well-trained lawyer. In a case not long ago in which I was associated with an eminent leader of the Bar, a very busy practitioner, I suggested that we might make a review of the historical origins of certain things. And when I came back with the report he reminded me of the farmer's suggestion that when going to the restaurant and asking for soup the girl said, "The only kind of soup we have is ox-tail soup" and the farmer said, "That is going pretty far back for soup."

As a matter of fact, you cannot go too far back in the study of matters that come to your attention. As it was so well expressed this morning, the lawyer who comes to the Bar without that equipment is hurting himself as well as his client.

These resolutions recognize that there are men who do not have to go to college in order to get that training. These resolutions make the allowance for that, and let me remind my friend from Tennessee, as I did yesterday, that we are making

recommendations to the Bar Associations of the entire country, and that it is for them to determine in each instance whether the conditions in their state require these standards, or anything higher or anything lower, but we do mean to assist the American Bar Association in these resolutions in formulating a sound public opinion of the Bar.

Charles S. Thomas, of Colorado:

*Mr. Chairman, ladies and gentlemen:* I would be very sorry, indeed, if the remark which I made regarding the motion of the distinguished gentleman from New York and the motion of my own should be construed as a reflection either upon him or as an imputation upon the fairness of the committee for whom he speaks. I think, however, and I think perhaps my impression is shared by a great many of the delegates to this meeting, that the supreme importance of the business in hand is of a character which should require and should therefore have the opportunity of the fullest discussion, even though it might result in some lapse of engagements, or in some other social disappointments while we are in the City of Washington.

No man believes more strongly than I in the need of education for the well-equipped lawyer. And so far as these resolutions affect the problem of education and of culture, I am in most hearty accord with them. I do not think, however, that I ever met a real successful lawyer who was not an educated man. Sometimes he got his education as I did and as you, Mr. Chairman, got yours, in that school of hard knocks and in the university of experience.

Like you, Mr. Chairman, I was down South in Dixie during the war. My mother's plantation lay athwart the pathway of General Sherman, and when he had finished his march there was not enough left of my mother's plantation to educate anybody. In those days we used to look around at the ruins on all sides and sing:

Hail! Columbia, happy land,  
If we're not ruined, I'll be damned.

I never had the advantage of even a high school education, but yet I am egotistical enough to believe that I am an educated man. And I may say that if I knew half as much now as I

thought I did when I got my certificate of practice, I would be at the head of the Bar of the United States. These qualifications come from experience and from the possession of those qualities without which no man can be a great lawyer, whether he has a university education or not. My distinguished friend, the Chairman in the short address which he delivered upon this subject, referred to the need of a college equipment—I will not say education—but a college equipment, so as to raise our standards to the place where they belong. Now if a college were to raise the standard then I am for it. I do not mean to say that I am opposed to a college education, but I do say that there is no more ethics, no more morality to be gained from a college education than from an education in a lawyer's office. I have long ago reached the conclusion that education and morality are not comparable terms. We are the best educated people in the world, but are we the most moral? Crime today is so situated, so consolidated, that it receives more immunity than ever before in our history, and yet our education is universal and more widespread than ever before.

One of the greatest lawyers of my acquaintance, and I think the greatest lawyer I ever knew, who is in this room—and I am not to be deterred from mentioning his name for that reason—I served in the Senate with him for some years, is Elihu Root, of New York. He would have been just as great a lawyer if he had never seen a college, because he possesses the qualification of genius for the profession, coupled with the capacity for the hardest kind of labor. And that is what John Marshall possessed. Let me say right here, Mr. Chairman, that I disagree with your statement that if Justice Marshall had been face to face with the same requirement which these resolutions would place upon him that he would nevertheless have complied with them. He came out of the Revolution practically a grown man.

Chairman McAdoo:

I mean if faced with them today, under present conditions,

Mr. Thomas:

Well, we will take the conditions as they were, and the same conditions, of course, face a great many people now. Education,



that is practical education, I repeat, comes from ability plus industry, and to some extent opportunity, although a man who wants to learn makes the opportunity himself. Three great contemporaneous statesmen a generation or two ago were Webster and Clay and Calhoun. Webster was a university graduate, so was Calhoun, but was Clay their inferior because he was merely a mill boy? The man whose education came by the burning of the midnight candle, by taking advantage of those few opportunities which, in the beginning, were his, and by making the most of them, is he inferior? And would Clay, and men of his caliber, have possibly reached the positions which they afterwards so greatly adorned had they been required to follow some particular sort of culture or education as the foundation of their subsequent careers? I do not think so.

Consequently my objection to these regulations is that in my judgment the legislatures of the different states never will crystallize them into law, and that is a great consolation to me. I should be greatly disappointed if I should find that that is not so as time passes. The fixing of this particular method neither raises the ethics nor constitutes any great claim for morality or in any other manner affects the question, except that those who desire such a course will, in all probability, find it not only desirable, but profitable. I cannot reconcile my information, my contact with men, my experience with men, with the fundamental proposition that many of them cannot possibly, by reason of industrial or economic conditions, poverty or dependence of others upon them, and so forth, who desire to join this great profession of ours, who might adorn this great profession of ours, find the opportunity to do so if these hard and fast rules are to be enacted and the door to opportunity to that extent closed in their faces. Mr. Byrne this morning spoke of the qualifications necessary for the practice of medicine. Of course the distinction between the practice of medicine and the practice of law was so well stated a few moments ago by Mr. Cohen that it is not necessary for me to refer to it. But I could not help but be a little amused when Mr. Byrne made the reference that he did. Imagine someone asking you what your education was, asking a lawyer what his

education was. Imagine a client saying, "Mr. Byrne, before I employ you, I want to know what college you graduated from, or whether you graduated from any, and I want to know what standard you met, or what preparation you had for your profession." Now I think with all due regard to every presence here that Mr. Byrne would probably tell such an inquirer to go to the devil. He would point to his reputation and standing and say, If you want me here are my services; if you think I am qualified, all right. If not, get a better man. The employment of counsel, in other words, depends on no such foundation. I cannot too greatly emphasize the fact that men of standing and character in the profession must be educated men. That is the basis of their capital, and it is that which constitutes the protection of those who need their services. The situation is very well illustrated by an old Union Pacific contractor out in my section of the world. He made quite a fortune in helping to build that great highway, and then concluded that he would like to go into the banking business, and he became president of a bank. One day a so-called tenderfoot from Massachusetts came in to borrow some money. He showed him a letter from his pastor and then a letter from one of the deacons of his church and then from one of the sisters in his church, and asked how much he could borrow. The old fellow looked at the letters and he said, "Oh, damn your religion, show me your collateral."

It makes no difference what sort of an institution you graduated from or whether you graduated from none; show the capital that you possess as a member of this profession, and you may be very sure that that is all that is or ever has been required.

Now I could, and so could you, from your experience, run over the list of hundreds and hundreds of the greatest lawyers of your sections and of your states, all of whom have come up from the ranks and who have adorned the profession to which they belong, and who have reached as high pinnacle in that profession as those who have had all these advantages of college training. The greatest lawyer today in the Senate of the United States is a self-made lawyer. He burned the midnight oil and he acquired the rudiments of his profession while earning a living for himself

and other members of his family. And I might name some college graduates up there who are lawyers, but if you were to employ them on a \$10 justice of the peace case, I should doubt your sanity. I am not saying this as a disparagement of the college bred lawyer, but merely to illustrate the proposition that it is not fundamental. After all it depends upon the man and the use which he makes of his opportunities thereafter. Something has been said about the intolerable delays of the law. Is that the fault of the lawyer who is not college bred, or is it the fault of counsel generally, plus the infernal condition of our methods of procedure throughout the country? Or is it because of the multiplication of statute upon statute until today a man hardly dares to kiss his wife without first consulting the statute book to see what section of the compiled laws is covered by that situation. Those are the conditions which cause this multitudinous and ever growing confusion in the application of our law to concrete conditions and cases. And they will disappear when these causes are themselves attacked, as they should be. How many of those present are aware of the fact that the statutes of the United States do not impose a salary qualification upon the selection by the President of a Judge of the United States Court? I refer to the supreme circuit or district. I suppose it might be said by implication that he must be a citizen of the United States. But with that exception there is not a single qualification, and the President might appoint a physician or blacksmith tomorrow, or a walking delegate, just as legally, or he might select the greatest lawyer within the jurisdiction of the country. Let us look to these things which are practical, but do not forget the man who has his eye upon the profession who has thought that it always has been an opportunity for the poor man and the poor man's son, who looks forward and who is encouraged by the records of the careers of those great and eminent statesmen and lawyers who have in the past, notwithstanding adverse conditions, been able to take advantage of those liberal rules and regulations under which men may be self-educated, and then turn his education toward an admission to the profession, and make that profession his calling in life. These are the men for whom

I speak; these are the men who everywhere in my judgment will appreciate the fact, notwithstanding we are now an organized national body, that we propose to close no door in the face of any man, however humble, in the face of any immigrant, however ignorant, who aspires to a position in the noblest and greatest and most liberal and enlightened of professions.

Mr. Cohen:

Will the Senator yield for a question?

Mr. Thomas:

Gladly. I want a drink of water anyhow.

Mr. Cohen:

Would the Senator advise this Conference to treat the profession from the angle of the opportunity that it furnishes to a young man to make it his livelihood, or would he have this Conference treat it as an opportunity for service to the community?

Mr. Thomas:

Both. By all means, both. I would raise the standard of ethics, I would be in favor of the most drastic regulations seeking to confine admission to the Bar to men and women of high repute and good moral character. There is where laxity exists, and that laxity should be corrected. A man should not be permitted to present certificates from obliging friends to show that his character is good and his morals unquestioned, but he should be subjected to a searching examination, both personally and by reputation. That is the way to raise the standard of the Bar, and even then it would be impossible to keep out a great many unworthy members who creep into every profession, however great or however low.

Harry S. Knight, of Pennsylvania:

Will the Senator yield for a question?

Mr. Thomas:

Certainly.

Mr. Knight:

Admitting, Senator, all that you say, that you cannot ascertain a man's character under our present methods, how would you outline a method for raising the standard of ethics?

Mr. Thomas:

I am satisfied that it can be done. If you want an offhand answer, I would say that it could be done very much in the way that we learn of the character of witnesses upon the witness stand. I have no doubt that if a man of questionable reputation should ever fall into the hands of my distinguished friend, Mr. Cohen, that his reputation would be revealed in very short order, either to his admiring or disgusted countrymen. Now I am acquainted with two of the greatest engineers in this country who never had the advantage of college training, or of high school training. One of them lives in New York and the other in Dayton. What would be thought of an engineering profession that would bar men like that from the ranks of that great calling because, forsooth, they were not equipped with a high school education, or with two years at some college or university? The situation as it strikes me is this: Every citizen of the United States of good moral character has the right to join the profession of the law, if he wants to.

Mr. Cohen:

Without training, Senator?

Mr. Thomas:

If he can qualify and has that character before the Examining Board, he should be admitted, yes. If he lacks the training that is necessary, you will never hear from him again, just as a great many college graduates sink out of sight just as soon as they are face to face with the stern realities of a profession. If he has it, the training will come. It has come to you, sir, as it has come to me, and as it has come to a great many men who have adorned the profession, who have been eminent contributors to its glory and who, had they been faced with the qualifications required *in limine* in this resolution, these qualifications that it is

proposed to impose upon the young men of the country, would have had to follow some other pursuit.

Let me add one other reflection and then I am through. I speak now in behalf of the Association. I have told you gentlemen that the profession is already under criticism because its work is open to the current public opinion which runs in the direction of thinking that by our action we are attempting to create a professional monopoly. Just so long as that is true will much of our usefulness disappear. I have heard in my travels, and my travels have been somewhat extensive since last September, mutterings about these resolutions, suspicions, some of them expressed very openly and candidly, that following the general trend of centralization and of combination, the Bar of the United States proposes also to limit its membership, close its doors except to the favored few who may comply with its regulations, and by that means limit its membership and increase opportunities for wealth and power, which will go to those who fall within the charmed circle. You say there is no justification for it. I admit it. But there is no justification for many of those currents of public opinion which in their wide sweep through a country like this must necessarily react upon those who offend it.

Homer Albers, of Massachusetts:

Mr. Chairman, if the resolution which has been presented passes, then I would like to submit the following resolution:

*Resolved*, That the National Conference of Commissioners on Uniform State Laws be requested to draft a uniform act to be presented to the legislature in each State where the matter is within the legislative power, and to other proper tribunals, whether courts or Bar examiners or other officials, requiring, so near as may be the standard for admission to the Bar approved by this Conference.

*Further Resolved*: That all bar associations be requested to actively endeavor to secure the adoption of such uniform law or standard for admission to the Bar.

If the other resolution is passed, I should like the privilege of addressing the meeting for about two minutes on that resolution.

Chairman McAdoo:

The resolution is not properly presentable at this time, so the discussion of this resolution will be continued at the afternoon session and the Conference will now be adjourned for luncheon.

Thereupon, a recess was taken until 2 P. M.

## AFTERNOON SESSION.

*Friday, February 24, 1922, 2 P. M.*

The meeting was reconvened at 2 P. M. by Chairman Goodwin.

Chairman Goodwin;

Before proceeding with the regular program, the Secretary of the Section of Legal Education of the American Bar Association has asked the privilege of making an explanation in answer to a suggestion made this morning in regard to the question of the part-time law school. I recognize Mr. John B. Sanborn, of Wisconsin.

Mr. Sanborn:

*Mr. Chairman and gentlemen of the Conference:* From some inquiries which have been made to me personally, and from some things which have been said in the discussion, it has seemed to the Section of Legal Education that it may, perhaps, anticipate some things which might come up, if a brief explanation were made as to what has been done and what is being done in regard to the classification of the law schools. As Mr. Root called to your attention yesterday, the third paragraph of the resolutions adopted by the American Bar Association commands the Section of Legal Education to publish from time to time the names of these law schools which comply with the above standards, and the names of those which do not, and to make such publications available so far as possible to intending law students. Of course, as he indicated, that mandate comes from the American Bar Association and it is the duty of the Section to proceed with that classification and with the publication of that information irrespective of any action of any other body. Of course the Section has no power to amend in any way the standards which are here set forth. The Section, of course, appreciates that there are a great many things in these standards which may require some consideration, and which may require further definition in time. The Section is now endeavoring to obtain from the law schools of the country the necessary information to enable it to make up its mind as far as it can on what are the definitions of many of these terms. I suggested this morning, for instance, the question of what is "devoting substantially all the working time to

the subject." That may be a question to which the Section will have to give careful consideration. Of course that will necessitate a definition of those who do not devote substantially all their working time to the subject. And there are very many other things which will require careful consideration before they are defined. I can say this, however, that the Section is not now prepared to say, and I am sure I could not answer the question, because I do not have the information, as to what definition it will give to any of these terms upon which there may be dispute. We do not know. We have not enough facts to proceed on as yet.

I asked from all the law schools that are here represented, directly and indirectly, that we might receive from those schools information as to which of them have any idea that they ought to come in the first class, or whatever you will call it, of those schools, and which anticipate within the measurably near future that they will come within that class, and asked that we might receive from them hearty cooperation in obtaining the facts on which we must base our action.

I speak of the schools which anticipate that they may come into that classification. It seems to me that these standards for schools have a double purpose. In the first place they are to indicate to intending law students what schools meet the standards that the American Bar Association has approved. In the second place, they set a goal toward which we hope the other law schools, or a great proportion of them, will set their pace. Speaking for myself on behalf of all the members of the Section with whom I have been in communication, I can, I think, assure the law schools who are within measurable distance of that goal that they will receive from the Section every encouragement and every recognition, and I anticipate, although, of course, no formal action has been taken on any of these matters, that when it comes to a final classification, if we have reason to believe that such and such a law school will, in 1923 or 1924, be able to meet those standards, we will so announce, and not leave the impression that that school is entirely in the lower ranks and has no idea of coming up to that goal. While we have no subdivision of the second class, as I say, I think I represent the sentiment of the Section when I say that some method can be devised for the plan of giving recognition to those schools which, in good faith, are



endeavoring to comply with the standards and do not feel, as many of them properly do not feel, that they can take the jump which in most cases has come from no college to two years of college all in one year. Many of them have gone up one year and anticipate going up another year in the near future.

Now if there are any points on this which I have not made clear, I will be glad to answer any questions.

The Chairman:

I think we had better limit the discussion on that. I will say, gentlemen, that this explanation has been permitted at this time although it is out of order. We have nothing, whatever, to do with the classification that is to be made by the American Bar Association on legal education. We are only here to discuss certain propositions and see what means can be adopted to bring about conditions that would make it possible to attain those purposes.

Wm. Draper Lewis, of Pennsylvania:

May I beg your indulgence as a member of the Council of the Section of Legal Education to say that Mr. Sanborn, of course, represents, so far as I know, every member of that Council in his general attitude. I also want to say in regard to Mr. Sommer's address this morning that I am quite certain that I speak for all the members of that Council when I say that our disposition will be to practically set down with him and others representing part-time law schools, with the object of so arranging the classification and carrying on the records of the American Bar Association as to help those good part-time schools that are desirous, as many of them, I am quite sure, are, of conforming with and helping the Council of the Section of Legal Education of the American Bar Association to carry out, not only the letter, but the spirit of the directions which have been imposed upon us by the American Bar Association.

The Chairman:

I would like now to introduce the Chairman of the afternoon. Before doing that, I would like to say that the resolutions presented this morning, I understand, are being printed. The committee desires to have every delegate and every alternate

present read the resolutions and consider them carefully. It will not be possible to discuss them in detail, but we want every delegate to be familiar with the text.

A great Chief Justice of the United States who has passed away said of the presiding officer of this afternoon's session that no one had presented in his experience as a Chief Justice of the United States his causes with greater ability or with greater success. Another member of the court, using a somewhat more vernacular expression, said that he had the highest batting average of any one who came before him. I take great pleasure in introducing to you, as your Chairman of the afternoon, the Honorable John W. Davis.

Chairman John W. Davis:

Gentlemen of the Conference, you will not, I am sure, if there were no other question than that of time involved, expect the Chairman of your closing session to attempt to gather any flowers of speech in a field that has been so thoroughly garnered as ours. I shall count my duty fully done if, as your presiding officer of this session, I am able within the limitations of that office to help you gather in the fruit of your two-days' discussion. Without saying more, I invite you to turn to the business of your closing session.

The resolutions which are before you were read just prior to your mid-day adjournment. I have been told that printed copies are not yet present. I shall ask before they are open for discussion that the Secretary re-read them to you.

(Secretary Harley re-read the resolutions.)

Maximilian T. Rosenberg, of New Jersey:

Mr. Chairman, is there any time limit set for the discussion?

Chairman Davis:

There is not, as I understand it.

Mr. Rosenberg:

I move that speeches on this discussion be limited to five minutes.

(The motion was variously seconded and carried without dissent.)

J. Newton Fiero, of New York:

Mr. Chairman, I desire to present for the consideration of this Conference action taken by the New York State Bar Association upon the initiative of a Committee of Nineteen, which was appointed in 1916 upon precisely the point at issue, or several of the points at issue. I shall only call your attention to one, and that is the matter of the length of time that a student should be obliged to spend on his education before entering upon the study of the law. This committee consisted of 19 members, 15 active members and four advisers. It was appointed in 1916. The advisory members consisted of three former Chief Judges of the Court of Appeals,—former Chief Judge Alton B. Parker, former Chief Judge Cullen and former Chief Judge Bartlett—and former Justice, and now Secretary of the State, Hughes. I propose to give you simply the recommendation upon this point made by that body after a very thorough and careful examination. Correspondence was had in the first place with the deans of every school in the country, in the next place with the Vice-Presidents of the American Bar Association in every state, again with the members of the Council of the American Bar Association, and again consultation was had with the members of the Bar of the State of New York, and we believe that the result of this examination and inquiry is that we have had before us the views of leading lawyers and the sentiment of the lawyers throughout the country. As the result of that the committee reported and the recommendation adopted was that the standard of preliminary study for the Bar be raised to a requirement of one year of college training or its equivalent, such equivalent to be formulated by the deans of the law schools and approved by the Educational Department and passed upon by the Court of Appeals.

I offer this on behalf of the Bar Association of New York and for the purpose of indicating what appeared at that time to the committee when both views were urged, that in favor of no college requirement and that in favor of two and four years college requirement, that there was a middle ground which I want to submit for the action of this Conference. I ask that the report of the committee and the action of the Association be placed on file at this time.

Chairman Davis:

The report will be received.

Josiah Marvel, of Delaware:

Might I ask the spokesman for the committee why they did not insert in the resolution referring to the law school work the word "equivalent" as you did in the college work? Under that you permit the equivalent of two years of college work.

Mr. Cohen:

In proper cases.

Mr. Marvel:

Yes, but what are your reasons for not inserting the same language in permitting the Bar committees in the various states to permit the equivalent of three years' law school work?

Mr. Cohen:

Does the gentleman from Delaware mean that we ought to have provided in the resolution for the equivalent of a law school training?

Mr. Marvel:

That is my thought, and I wanted to know your reasons why you did not include it.

Mr. Cohen:

I will be glad to answer, sir. It is the opinion of the committee, and it was the opinion of the American Bar Association, that just as in the case of the practice of medicine, it is not practicable to secure a legal training except in a law school. While it may be practicable to secure the equivalent of a general education by industry and perseverance, it is not practicable to get the tools of your trade in anything but an adequate law school.

John Lowell, of Massachusetts:

*Mr. Chairman, ladies and gentlemen:* I was chosen a delegate to this convention and I am proud to have been so chosen, by Henry S. Hurlbert, President of the Bar Association of the City of Boston, to whose patriotic spirit, untiring industry and ability

more than to that of any other man, unless it be our attorney-general, we are indebted for the house cleaning of the Bar of Massachusetts which is now going on. I refer to the removal from office of two district attorneys for blackmail and other causes. And it behooves me at this time, coming from Massachusetts, to speak on what I regard as the most essential, or certainly as essential an advance in the ethical requirements of admission to the Bar. You doubtless all know that every state requires that a man should be of good moral character. Some states require no affidavits. There are only four states that require a Committee of Character. A single affidavit, it is hardly necessary to say, is a farce. There is a case down in Tampa, Florida, which was referred to me, of a man who could not get a certificate of good moral character in his town, so he went into the next town, was on his good behavior for three weeks, and came back with a certificate of good moral character and was admitted to the Bar, embezzled money inside of a month and was disbarred. That is an illustration of why a mere certificate of moral character is not of much avail. Now I have this suggestion to make; it is concrete, but not very definite. I am thoroughly in accord with this resolution; I am in accord with this resolution because a young boy can go through Harvard College, if necessary, and I believe can in other colleges, or for two years because we have aids there to help those boys and all we have got to do is to let those aids be known. And I want to make this suggestion to you. There are not only the aids for a boy—we call it the Harvard Loan Fund in the case of Harvard College,—but the boy who applies for that aid can get that aid whether he is a scholar or not, if he is worthy. We get the opinion of the authorities in that college, and then make up our mind, the board being managed by the trustees independent of the college. If the boy is worthy he is going to get that aid. The dean has got to write us a letter showing that the man is of good moral character.

My second concrete suggestion is this, that we should strive to see to it that all the states have Committees of Character. After the regular examination, the applicant should be submitted to an oral examination by special committees of character, preferably chosen by the courts. I also believe that he should have

to present to the Committee of Character, the certificate from the dean or officer of his law school that he has a good character. That certificate is worth something.

Now I have another suggestion, that in the law schools you should have, and most of them have it already, a proper teacher of the code of ethics, and proper examination on the code of ethics. In addition to the certificate from the dean of the college you should have a certificate from the man who has taught the law student in the law school legal ethics. I think if you have those two certificates and with the Committee on Character making the oral examination, that you are going to accomplish something.

One thing further and I am through. I think it will be possible to have the Committee on Character, a committee to whom a boy could refer when he needs advice and help. There are a good many poor boys. I am thoroughly in sympathy with the desire to have the poor boy a member of the Bar if he is a worthy boy. No resolutions that do not provide for that should be tolerated. We have got to have the worthy young man. I have them in my own office. But those boys, just as sure as I am talking to you, the real good ones that will help and not be a menace to the community, will get that education. I should like to see that Character Committee, a committee to whom these boys can refer when they are in doubt as to what course they should pursue.

Those are suggestions that I would make to you. I feel them very, very strongly. I was 15 years with the Grievance Committee of Boston. We suffered not only from lack of education, but we suffered from men who had no moral standards. Let us see to it, so far as in us lies, that we can give future law students proper education and that no boys get by, if we can provide any way to prevent it, that are going to be a menace to the community afterward.

W. C. G. Hobbs, of Kentucky:

Mr. Chairman, I come from what may be considered a provincial town. The little town of Lexington, Fayette County, Kentucky. But I know you will pardon me when I say that for 30 years I have had the honor of practising at the Bar that was

adorned by Henry Clay, John C. Breckenridge, George W. Robinson, Black, Kincaid and other lawyers that made this country famous. Now that Bar Association, of which I am a representative here, endorses fully and thoroughly the resolution passed by the American Bar Association, and if the one hundred and one lawyers were here to a man they would endorse and approve the resolution that was read a few minutes ago.

In that little provincial town we have two great universities, one through which Mr. Justice John M. Harlan had both his law and his academy training as well, and various other men, old Transylvania, now in its one hundred and twenty-seventh year, a State University that has a splendid law school. And there is nobody in Kentucky so poor that he is unable to obtain his degree from either Transylvania University or the State University, and then to obtain his legal degree from the college. We Kentuckians mean to see that the humblest man's boy, farmer, mechanic or business man, who is worthy, may have the education required by these resolutions, both academic and from a legal standpoint, and as the representative of that little bar association I want to give our wholehearted approval to this matter.

Michael F. Dee, of New York:

Gentlemen of the Convention, I realize that the time is short, five minutes being allotted to each speaker, and I am going to be extremely brief and, I hope, a little bit concrete. I suspect we have been listening most of these two days to arguments in favor of a great major premise of a syllogism that a greater amount of legal education is highly desirable. The old scholastics used to say that to dispute a man's major was insulting. Nobody disputes that major. But whether that program announced in this resolution will accomplish that result, is a minor, and on that resolution we may honestly differ. Let us look at the resolution. The great speaker who introduced this business yesterday pointed out to us that we are not talking in abstractions at all, that this resolution and its results are vibrating with vitality. The active and actual result of the adoption of this resolution and its substance is here on page 9 at the foot of the little booklet

found at the door, though enlarged to some extent by a half dozen additions that are really unsubstantial and operation under it is, in the words of Mr. Reed of the Carnegie Foundation, going to, in substance, sear out of existence those law schools which do not come up to the requirements decided upon by this board,—not by this Conference, let it be understood, but by the board investigating this matter. Let me come to the heart of one of these points. We are talking about full-time schools and part-time schools and the secretary of that board or subdivision or whatever it may be, informed us a half an hour ago that the matter of this definition is postponed. This definition is vital and we are asked to approve of those resolutions without knowing what that definition will be. In other words, if we approve of that system of pitiless publicity, it is going to sear out of existence the law schools. What law schools? Those that we are able to specify here today? No. Such law schools as in the final determination of that board shall not be full-time law schools. Gentlemen, are we asked to do a reasonable thing in that regard? I want to disclaim being in any sense an advocate of inferior legal education.

Mr. Cohen:

Will the gentleman yield for a correction?

Mr. Dee:

I will yield for a suggestion of a correction, but I desire to say that five minutes is all too short to express what I want to express.

Mr. Cohen:

I ask that his time be extended so as to permit him to have the five minutes, Mr. Chairman.

Chairman Davis:

Without objection it will be so ordered.

Mr. Cohen:

The resolutions which have been offered here and which are the subject for debate, do not call for the creation of such a body that will supervise the law schools. Copies will be available presently.



Mr. Dee:

I desire to say, answering the suggested correction, that the Secretary of the Section of Legal Education of the American Bar Association who opened the meeting this afternoon with the reading of the resolution, referred in effect to sub-division 4 on page 10 of this printed form, and stated that the Section of Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and those which do not, and to make such publications available, as far as possible to intending law students.

Mr. Cohen:

I rise to a point of order merely for the purpose of clarifying the discussion.

Chairman Davis:

You may state your point of order.

Mr. Cohen:

This Conference cannot adjudicate the action of the American Bar Association. It has adopted a procedure which Senator Root outlined. So far as we are called upon by it, we are confined to the resolutions that the committee has offered and those resolutions merely commit us to the standards named in our resolution. The gentleman, in discussing the council and its functions, is discussing a matter wholly within the jurisdiction of the American Bar Association, and not germane to these resolutions.

But I will withdraw the point of order.

Mr. Dee:

I want to be entirely courteous to the gentleman who has twice arisen with suggested corrections, and to call the attention of this body to the fact that we are asked to pass a resolution of approval of certain points, and that the resolution will come up for action at this Conference before we adjourn this afternoon, and in that resolution is included every single item, because I followed the reading twice today, included in this report. When I read from this report—

Mr. Cohen:

The gentleman is incorrect in that.

Mr. Dee:

Excuse me, but I must insist upon being permitted to continue.

I may say, gentlemen, that I represent a law school of some 1100 students in the City of New York, the Fordham Law School, downtown in the midst of the lawyers, and let me say, though it sounds unpleasant, but I intend it merely as a presentation of an objective situation, that though I have been the head of that law school for 10 years, and I assume that the leaders of the New York Bar are here today, I suspect that none of them has ever before seen me or known my name until I arose here today, or was aware that I was connected with an educational institution. What are they doing now? They are coming before you now, and what are we asked to do? They are proposing to correct the evils of the Bar and put the correction of those evils entirely on the law schools. And the law schools, let it be suggested in passing, are not allowed to vote on that very thing. Will two years of college advance the position of the law student? Out of our 1100 students we have some 200 who are college A.B.'s. I say from personal experience, and I am trying to be honest because unless you assume our honesty then we get nowhere—we get nowhere unless we assume the honesty of the others—there is a certain type of college graduate in our school who is a greater evil than those who are not college graduates. And why? What is the radical defect in the law student today? It is rebellion against authority. Where is that corrected, in the Metropolitan college of today? I want to say that destructive criticism is rife in the eastern cosmopolitan colleges today, and while I personally feel that the international colleges in no sense are giving way to that destructive criticism, the blanket requirement of two years of college preparatory work gives you only a greater rebellion against authority.

James Byrne, of New York:

Mr. Chairman, I rise merely to say that I have heard the gentleman who has just spoken before with great pleasure, and I know him very well, having heard him at state bar associations.

Mr. Marvel:

Mr. Chairman, I desire to move an amendment. I have not a resolution and I cannot submit my resolution in writing, but it is sufficient, perhaps for the committee and for the information of the members if I propose an amendment providing that the courts and the Bar committees may, under proper circumstances, accept the equivalent of three years' work in a standard law school. That will be using the same language that they have used regarding two years in a college. I move that amendment.

George A. Ward, of the District of Columbia:

I second that motion, Mr. Chairman.

Mr. Marvel:

In moving this amendment I am largely moved by my very keen desire that this Conference do something that will practically advance the standard of the Bar. We assume, to a degree, to be the leaders of the Bar of this country; we assume, to a degree, to attempt to lead public thought in this country regarding the relations of the Bar to the public. A leader, as you know, is one who is going in the same way with the people but a bit in advance. If they go too far in advance and disappear around the corner they are no longer leaders, they are lost. I am very fearful that the resolution of the American Bar Association, as modified even by this Conference, is attempting to go too fast. I think it is not practical. I think we cannot rapidly carry it into effect, that is, not so rapidly as we would if we show the bar associations through the country what we propose as a standard and urge them to cause the students at their Bars to reach that standard as rapidly as possible. So that your own committee waives the American Bar Association standard as to two years of college and says under proper circumstances we recommend that that be waived. Now I ask you to go one step further, that the courts and Bar committees throughout the country may be permitted to waive three years at a college law school under proper circumstances. If it were thought that that was impossible, as Mr. Cohen said a while ago, that a proper preparation for the Bar and the making of a good lawyer could only be obtained in a law school, I would stand with the mover

of this resolution, but all history refutes that. If you say it cannot be done, then I cite you John Marshall. If you say it cannot be done, I cite you four members of the Supreme Court of the United States sitting today. If you say it cannot be done, I cite you every member of the judiciary of my State of Delaware, not only of our state courts, but of the United States Courts, and our members of the Circuit Court of Appeals of the Third Circuit. It can be done. It is different from a doctor. Turn the right boy into my library, or into yours, with the proper effort and ability and time, and he can come out as good a lawyer as many college graduates and better still. It can be done without the law school and I ask you that the boy who furnishes the proper effort, the proper ability and the proper character and produces to a law committee or a court that which is the equivalent of three years at law school, let him come to the Bar as those of his predecessors have, for the purpose of entering upon a career that may be a benefit not only to himself, but to the community in which he lives.

Chairman Davis:

In the absence of any rules of order, the Chair is in doubt about the proper procedure, whether these amendments should be accepted as made and held for a final vote *seriatim*, or whether we should vote upon the amendments as they are made and dispose of them immediately.

Mr. Cohen:

I move that it be the order of the house that we proceed with the discussion and that at an appropriate time we proceed to vote upon the pending motions before the house, the appropriate time to be determined later.

Chairman Davis:

And the resolution and all amendments thereto in their order?

Mr. Cohen:

Yes.

Chairman Davis:

Do you mean to vote on each substitute, or the original motion?

Mr. Cohen:

Each substituted point. We will postpone the vote until we have had a thorough discussion.

Chairman Davis:

It is moved and seconded that the vote on the substitutes and amendments be taken in their inverse order. What is your pleasure regarding that?

(The motion, being duly seconded, was carried.)

W. H. Ellis, of Florida:

Mr. Chairman, I will offer as a substitute the following, and with the permission of the Chair I will read what I have prepared. It is not my purpose to offer any word in defense of this resolution, deeming that it speaks for itself. And regarding the proposition before this body as one largely in the nature of a local question, I offer this resolution:

WHEREAS, A reasonably high standard of character and literary and technical training should be required of all persons desiring to practice the profession of law in the United States, and

WHEREAS, The subject is one with which the Bar of each state should deal through its own organization as an instrumentality of the State, therefore

*Be it Resolved*, That the State Bar Associations represented in this convention pledge themselves to such activities in their respective states as may lead to the enactment of such legislation as shall vest in the Bar of each state the power to prescribe such qualifications for admission to the Bar as may be deemed suitable.

• Chairman Davis:

You offer that as a substitute for the present resolution?

Mr. Ellis:

Yes.

Chairman Davis:

Is there a second to the motion?

(The motion was seconded.)

Mr. Cohen:

May I address an inquiry to the mover of the resolution?

Chairman Davis:

Yes.

Mr. Cohen:

Do I understand from your resolution, sir, that the effect is that it will mean that the Bar of each state will have complete control of the admission of the successor of the lawyer then a member of that Bar?

Mr. Ellis:

The resolution deals only with the application for admissions to the Bar.

Mr. Cohen:

The determination of the qualifications for admission to the Bar?

Mr. Ellis:

Yes, and such activities—

Mr. Cohen:

Then may I ask the gentleman how he will meet the probable criticism that will come from the control in each state by the existing Bar of future admissions to the Bar?

Mr. Ellis:

That will be a question which we will answer when we get to it, of course. Gentlemen of national reputation as lawyers of unquestioned ability have spoken on this subject both pro and con, and that is an illustration of the fact that the difficulties are exceedingly great.

Mr. Root:

Mr. Chairman, I have to leave in 10 minutes to take a train; may I ask the indulgence of this body to use five minutes of that time? There have been two kinds of suggestions made in opposition to the approval of the action taken by the American Bar Association. One is in recognition of the serious evil with which our Bar ought to deal. The evidence that has been produced from many lips here during the past two days shows that this nation, more than one-half of which has come to live in cities where men know little of each other, can no longer maintain a Bar of the quality and character that has built up this republic

in accordance with the customs and usages of earlier and simpler times when men lived in rural communities and knew all about each other. But the recognition of that fact distinctly made, for example, by the gentleman from Florida, who proposed the substitute a few minutes ago, is accompanied by a pious hope, a resolution wholly ineffective to cure anything, just such as we have been having for a quarter of a century before the American Bar Association finally came to a concrete conclusion, which, if adopted, will accomplish something. I think that the proposal of my friend from Delaware, Mr. Marvel, is of the same general character. It is to approve the standard but remove the standard at the same time. Now, for heaven's sake, do not let us stultify ourselves. If there is something wrong, as there certainly is, let us deal with it, and not use weasel words about it.

Another class of objection was illustrated this forenoon by my friend, the former senator from Colorado, Mr. Thomas, for whom I have had for 40 years or more, since we first met in the Supreme Court of the United States, not only great admiration, but warm friendship. Now my good friend was responding not to a study of this subject, but responding to the natural reaction of a man who rather dislikes to have the old traditions of his life interfered with by somebody else.

I am willing to admit that if you concentrate your attention, as he did, upon Thomas and me, you do not need any cure. We are too old to be anything else. Whenever trouble comes it comes in the fact that this Bar of ours is being filled up to the brim at every term of court by thousands of young men whom nobody knows anything about. And the question is how to get a line on them so that you can keep the fellows out that are merely trying to get an opportunity to blackmail and grind the face of the poor, merely seeking an opportunity for more successful fraud and chicanery by having a law shingle. How can you let in the good fellows, the earnest, sincere fellows, and keep out the black scoundrels of the future? I have not heard any suggestion that takes the place of saying that you shall have a period, in the nature of a period of probation, where two things shall happen to you; where you shall be under the observation of men whose testimony regarding your daily walk and conversa-

tion will be accepted as proving whether you are the right stuff or not, and the other that you shall be under such conditions that you will be taking in through the pores of your skin American life and American thought and feeling.

My friend Thomas did not do himself justice in the story about the banker who said, "Damn your religion, show us your collateral." That is not his character. That did not come from Thomas. That did not come from his heart. It came from the nature of the proposition that he was arguing and I am against it. God forbid that that shall be the principle applied to building up the American Bar of the future. Above all the stocks and bonds that can be made into collateral, stands as a guarantee of the future of our great and prosperous country, the character of the men who come to be called to the Bar. I hope sincerely that this Conference of men who hold dear the good name and the prosperity and the moral qualities of the communities and states from which they come, will not here vote to stop the only effort the Bar has ever made to answer the prayers of the good people who want our country better, and to answer the terrible responsibility that rests upon it to maintain the free institutions which are to perpetuate liberty and order in our dear country.

All that the opposition here comes to is simply to stop, to stop! to do nothing! stop the American Bar Association, disapprove them, tell them they should do nothing! How much better, instead of beating over the prejudices and memories of a past that is gone, it is to take dear old Edward Everett Hale's maxim, "Look forward, not back; look upward, not down, and lend a hand."

(Cries of "Question," "Question.")

Mr. Cohen:

Mr. Chairman, I move that we proceed to a vote upon the resolutions in parliamentary order at a quarter to four.

(Cries of "Vote now" and "Question.")

Mr. Cohen:

Then I move that we proceed at once.

(The motion, being duly seconded, was carried.)



Chairman Davis:

The pending motions will be put in order. The first question is on the substitute offered by the gentleman from Florida, Mr. Ellis. As many as are in favor of that substitute will say "Aye." Contrary, "No." The "No's" have it and the substitute is lost.

The motion is now upon the amendment offered by the gentleman from Delaware, Mr. Marvel. As many as are in favor of that amendment will say "Aye," contrary, "No." The amendment is lost.

The next motion is the one offered by the committee, moved by Judge Goodwin and seconded by Mr. Cohen. As many as are in favor of the adoption of this resolution will say "Aye." Opposed, "No." The "Aye's" have it and the resolutions are adopted.

Mr. Cohen:

I offer the following resolution, and I ask that, in view of the fact that this calls for action on the part of the delegates and alternates, attention be paid to it. It is the only other resolution that will be offered on behalf of the committee:

*Resolved*, That the delegates and alternates from each state shall nominate one person to represent the State on a committee to be known as "The Advisory Committee on Legal Education of the Conference of Bar Association Delegates." The duty of the Committee shall be to advise and cooperate with the Section of Legal Education and Admissions to the Bar of the American Bar Association to promote the adoption of the standards of legal education and admission to the Bar approved by this Conference, and encourage the improvement of legal education.

The first meeting of the committee will be held at 9.30 tomorrow, Saturday morning, in the rooms of the United States Chamber of Commerce, Mills Building.

The purpose of the latter end of the resolution is not that there shall be a full meeting at that time, but that the committee shall be apprised as early as possible of the nominees from each state. I move the adoption of the resolution.

(The motion was carried.)

Mr. Goodwin:

Mr. Chairman, I move that the Conference of Bar Association Delegates tender to the National Daughters of the American

Revolution our sincere and our warm thanks for the use of this beautiful hall.

(The motion was carried.)

W. A. Hayes, of Wisconsin:

Mr. Chairman, I think the brief motion I am about to make is appropriate. There is ill in the city one of the great men of the country and one of its great citizens and one who has been one of its great public servants. I refer to the gentleman who is a great educator and who, 28 years ago, appeared before the Section of Legal Education of the American Bar Association and delivered a most learned and stirring appeal for the broader education of the members of the Bar. I move a rising vote of sympathy for the early and complete recovery of former President Woodrow Wilson.

(A rising vote of sympathy was extended to Ex-President Wilson.)

The Conference thereupon adjourned.

HERBERT HARLEY,  
*Secretary.*

## SPEECHES AT DINNER.

*Washington, D. C., February 24, 1922.*

The Chairman of the Conference, Clarence N. Goodwin, of Illinois, who presided at the dinner, in introducing the toastmaster, said in part:

The American Bar Association went into the Conference—one among two hundred twenty, with five delegates and five alternates out of a roll call of over six hundred fifty; it emerged triumphant, its program adopted, its leadership vindicated, and with the Bar Associations of the country brought into closer union. It is only fitting, therefore, that its President should act as toastmaster at this Conference Dinner.

Cordenio A. Severance, of Minnesota:

This dinner marks the close of an innovation in the activities of the American Bar Association. We may congratulate ourselves upon its success in number and attendance and the excellence of the papers and of the discussions, and in the progress it makes toward closer affiliation between the American Bar Association and the various state and local organizations.

The closer the bond and the more intimate the relation and affiliation of these various bodies, the more potential will be the Bar in making itself felt upon the issues, great and small, with which we are confronted, and in which we must inevitably take the major part in settling. The American Bar Association has, in the face of strong opposition, the sincerity of which I am sure none of us challenges, taken a distinct step forward in advocating advanced requirements as conditions precedent to the practice of the law. The increase in the number of colleges and universities and the institution and maintenance of law schools throughout the country has made that easy which would hardly have been possible, and certainly not feasible 40 or 50 years ago. The advancement of general culture in our country has made it inevitable that if the legal profession is to continue as the leader in public thought, it must continually seek to enlarge and develop the preparation for the exercise of its great functions. In the earlier days of the republic, and until a comparatively recent time, the standards that were set up to entitle one, by a certificate of admission to the Bar, to take upon himself the protection of the

lives, the liberties and properties of his fellow men, were very low. Very often after a few months only in the office of a preceptor, and a slapdash inquiry by a committee of the Bar which had had only a similar training, a candidate was received into the ranks of a supposedly learned profession. The shining success achieved by some men of note who lacked the advantage of the training now proposed as essential, has often been cited as proof that it is an unnecessary requirement. But we are legislating for the whole of the community, and not for the isolated genius who can surmount all difficulties; we are legislating for a State of Society and a general range of culture far different from that of a half century ago. I remember being told at one time by a lawyer who was examined for admission to the Bar in a western state, after a few weeks reading of law, that one of the things asked him was, as to the rule in Shelley's case. Having known of a farmer by that name in the neighborhood, but not having learned of any litigation, with which he had been connected, he wrote down as his response: "Unfortunately I have never heard that Shelley had a case." I am sure we are all familiar with that classic writing of Judge Baldwin, called "Flush Times of Alabama and Mississippi." Among the sketches is one describing the examination of a candidate for license during the year 1837 in Mississippi. The author says that a certain gentleman had made known his desire to be turned into a lawyer. Such requests at that time were granted pretty much as a matter of course. The author then remarks that practicing law, like shin-plaster banking or a fight, was pretty much a free thing; but the statute required an examination by a committee or by the court, so the candidate was put through his paces. Among other things he was asked to define a chose in possession. His response was that "If a man had two possessions to be chose, the one that he takes is the chosen possession." When asked the distinction between law and equity, his response was that "Law is as it happens according to proof, and the way the juror goes; equity is justice, and a man may get a devilish sight of law and get devilish little justice."

It is a tradition in the part of the west in which I live, that the first public witticism of that distinguished humorist, Bill Nye, was in connection with his examination for admission to the Bar. He had studied a few months in a law office, and pre-

sented himself as a candidate. It happened in that particular instance that the committee of the Bar took their duties rather seriously, as a result of which his lack of success in the examination was lamentable. He was a likable youth. When the adverse report was made to the court, the latter, knowing him, spoke in a fatherly way, advising him that as he had studied but a short time, he would best return to the office of his preceptor and pursue his studies until the next term of the court, six months hence, and again present himself, at which time he would doubtless pass an examination which would be a credit to himself and a source of satisfaction to his friends. Mr. Nye rose from his chair, bowed to the court and said, "Will your Honor kindly fix the amount of my bail?"

Not so many years ago it was not deemed even advantageous for men who were to pursue what is commonly called a business career to have had the foundation of a liberal education. It was frequently spoken of as a waste of time and a delay in getting on in the world. We have progressed beyond that period, and in all branches of business activity, manufacturing, banking or agriculture, it is normally recognized that a man with a college training or a technical education is superior in working capacity and effectiveness to one who is not possessed of such advantage. Of course, under these conditions the Bar cannot lag behind. But however well our young men and women are grounded in the classics and other branches of learning in our universities, and however diligently they pursue their studies in the law schools before coming to the Bar, they must have something more than the mere training that comes from books. They must be taught that they are not entering upon a trade, but are becoming members of a learned profession, limited in its membership to those who have shown themselves worthy, not only by education but by character. They should be taught and should understand, that in the practice of this profession they must observe its ethical standards; that there are other things in the world more important than winning a law-suit; that they are not running a department store with agencies and advertisements to drum up business. Too much emphasis cannot be placed upon this requirement. The law schools have made too little of this important matter in their curriculum. Neither the courts nor the committees of the Bar have adopted methods sufficiently drastic to maintain the tone

and standard of our profession in this regard. We are constantly receiving advertisements from corporations, announcing their ability to practice certain branches of the profession through counsel retained by them. Very often the names of these counsel appear upon their letterheads. We receive engraved notices from lawyers, stating that they have associated with themselves men (not members of the legal profession), who, because of some recent official position or otherwise, are especially qualified for the transaction of certain lines of legal business. If this is to go on, we may soon expect to have advices from members of our profession, to the effect that they have associated themselves with the chief-chemist of important distilleries and breweries, and are therefore peculiarly qualified to take care of violations of the Prohibition Law. In the law schools the young men and women should be so trained as to the nobility of their calling as officers of justice, that such methods will be impossible. We are either to have a profession devoted to the holiest of all human functions—the procuring of justice between man and man, and between man and his government—or we are to have a trade carried on like that of any huckster.

One more thought: The proposal of the American Bar Association is, that before entering the law school, the prospective candidate for admission to our profession must have had at least two years' college training. Having in mind the influence that will be wielded in the various communities of our country by the lawyers whose preliminary training is thus insisted upon, the duty rests upon the members of our profession to use their best endeavors that the teaching force of these universities and colleges be made up of men and women devoted to the ideals of our government, to the Constitution created by our fathers and applied with such marvelous success to the changing conditions that have arisen in the last century and a third. It is a fact that has been blinked at or ignored, that latterly, while we require an emigrant applying for citizenship to swear his devotion to our Constitution, we too often permit the youth of our country to have their unformed minds warped by lecturers and professors who are about as devoted to that Constitution as Lenine and Trotsky. In a public address recently delivered by the President of one of our important colleges, the audience was favored with the following:

"The federal and state governments, boards of education, Americanization societies, American Legions and organizations of every kind, are demanding that children and college students should be taught patriotism, concrete citizenship and 100 per cent Americanism. This means that the teachers and college professors as yet only in the public schools and state universities, but unless the movement is determinedly opposed, sooner or later everywhere, are being required to teach, not how to make things as they should be but that things as they are, are right; that the United States Constitution as written 134 years ago, is perfect; that our highly unsatisfactory government must not be criticised; that the United States flag, which as we all know flies over many cruel injustices which we hope to set right, must be revered as a sacred symbol of unchanging social order, of political death."

No more unfair characterization of the patriotic activities of the organization thus criticized could be made. No good American desires the stifling of discussion of measures for enlightened progress, our statute books are filled with salutary legislation which is the result of such discussions, but they have been placed there by the friends and not the enemies of our country and its institutions.

If we were honest men and women when we took our oaths of office as members of our profession, if we appreciate as we should, that it is because of the protecting arms of this Constitution that we have grown to be the greatest of all the powers in the world, with the most individual liberty and the highest average of personal happiness, then we must see to it that these facts are brought sharply to the knowledge of the youth of our country, and that we no longer ignore the fact that they are on all sides having dinned into their young minds revolutionary, fantastic notions, subversive of the Constitution and the protection it affords.

#### ADDRESS OF HARRY M. DAUGHERTY,

ATTORNEY GENERAL OF THE UNITED STATES.

#### THE AMERICAN BAR.

I congratulate myself that I have the privilege of meeting with you here tonight as brother lawyers. The pressure of official duties gives me little opportunity for speech making, and I therefore do not seek occasions to make public addresses

these days. However, I thank you for this invitation and for this opportunity, feeling full well that the inspiring support that you will give will be ample compensation for any message that I may bring to you.

I have always held the legal profession in the highest esteem, and now, after having had the experience of nearly one year as Attorney General of the United States, I can say that I am prouder than ever not only of the law as a profession but of the American lawyer.

The American lawyer, his ideals and his conception of service, as well as his character and equipment, both intellectual and moral, are of paramount importance to every man who loves his country and cherishes its welfare. The very nature of constitutional government makes the mission of the lawyer one of fundamental importance. In a government of law and order the lawyer must occupy a commanding position. His relation to the state brings to him the call of public service. His relation to clients, in the private affairs of life, demand of him intellectual and moral qualities of the highest kind. Hence, it is altogether fitting that you should gather here, to the end that the standards of the American lawyer may be elevated to as high a point as possible. Your work is intensely unselfish and patriotic. You have come here, without pay, and without expense to the public or to clients, and have taken common council together in this Conference from all parts of our country, from your distant homes, not for benefit to yourselves, not to devise ways and means by which you yourselves can profit, but you have generously and unselfishly given of your time and of your thought and of yourselves to considering those things which make for the honor and efficiency of our profession. Your object is to establish a standard so that the lawyer may be capable of responding to every call which his high position demands of him. This is, indeed, a serious and important work.

I have at times been doubtful whether the American lawyer today is doing as much in the way of public service as the lawyers of an earlier day. This may be because we see only the outstanding figures of our profession of a former day. When I think of the Fathers who framed the Constitution and of the splendid part of Hamilton, of Madison, of James Wilson, of Edmund Randolph, and others of that glorious group of young lawyers who



drank deep at the fountain of human liberty and, with united mind, gave the world a new conception of a constitutional government founded upon law and order, strong and forceful, and yet with individual liberty protected, I see before me for all time the vision and the ideal and the conception of public service that should be held up to every young lawyer. In earlier times, because the very nature and foundation of his profession made him more capable than others to do so, the lawyer embraced the privilege of speaking, of seeking opportunity to inform the people of their government, instructing and educating them, and impressing them with the necessity of each doing his part to sustain the stability of the government and to preserve an unshaken faith in it. To the lawyer of the past we are indebted almost entirely for this accomplishment.

Great as was the opportunity of the past, the service of the lawyer to his country, though less conspicuous and more humble, is equally imperative today. The needs of the hour are calling him to the support of his country, in defending her institutions, in inculcating faith among the people in these institutions, and in combating heresy and unsound notions of government that seek to undermine and destroy the work that the Fathers and those who succeeded them have transmitted to us.

The enemies of law and order are more active than ever before in sowing the poisons of lawlessness and unsound and experimental theories of government. These agencies have a small portion of the American press, and likewise their orators, scattering and propagating their vicious theories of government and casting unjustifiable reflections on men holding public office, with the intent to undermine the confidence of the people in them. These forces must be met and combated.

In a democracy where practically there is universal suffrage, it is important that every citizen be imbued with sound and wholesome notions of government. On whom is it more fitting to call in the performance of this public service than upon the members of the American Bar?

In almost a year that I have served as Attorney General I have not called upon a single lawyer to render service to the government, with or without pay, who has refused to do so. Their help to the Department of Justice has been marvelous and

most highly appreciated. No man can succeed as Attorney General of the United States without both the assistance and the confidence of the American lawyer. That is why I say, whenever I speak to a body of lawyers, that I consider every reputable lawyer in the United States a part of the Department of Justice. During the past year I have had hearings, conferences, contact, and dealings with probably one thousand lawyers, and I am happy to say, to their credit and for the widest publicity possible, that I have not yet found one of these lawyers untrustworthy, regardless of his interest in the cause or the nature of his employment.

If the state requires such high and important service of the legal profession, the lawyer who meets these requirements must be possessed of that intellectual and moral equipment that makes him efficient in performing these duties. In no calling are courage and fidelity more essential than in the legal profession. We admire brilliancy, but, by comparison, we discount brilliancy while we hold integrity at a premium. It is a matter of public concern to the state that the lawyer be absolutely trustworthy, both as to his moral character and his intellectual ability. Clients must trust him and are frequently at his mercy. He must be trustworthy in his relations to private litigants, but, far more, he must be trustworthy in his ability to answer the call of his country in performing his part in molding wholesome and sound public sentiment.

In these days when the exactions of business and commerce and industrial life are calling for so much of a lawyer's time and energy, there is great danger that he may forget the first requisite of his high and noble calling—that is, his duty to the state in inculcating sound notions and in educating the people and in forming correct public opinion, to the end that constitutional government may be preserved and its blessings disseminated among the people. *The lawyer's first public service, as a class, does not consist in holding office, but in educating the people to sound and wholesome notions of government.*

The American lawyer, the educator, the clergy, and the press everywhere are the agencies for the dissemination of sound principles of government and for educating the people to resist all efforts to undermine our system of government, and to foment revolution against its true, tried, and trustworthy constitution

and traditions. Because of its ability to reach the people, the greatest educational facility in this or any other country is a sound and truthful press. Constitutional government rests on the intelligence of the people. Since the foundation of our government, through the vicissitudes of storm and sunshine, to the present hour, a patriotic press has rendered most invaluable service to our country.

The educational service that I have dwelt upon is especially important not only because of the nature of republican government under universal suffrage, but because under the hospitable policy of our government, those born under other flags have come to our shores and participated in the freedom and liberty and resources of our country, and it is necessary that such people should be educated in our system of government and impressed with the benefits of that system. The education of all persons of this class is a prime necessity, and this call to public service is especially incumbent upon the lawyer.

Speaking to you intimately tonight as lawyers, I do not know what the history of the Department of Justice as now constituted will be, but I can assure you that its greatest ambition is to be helpful in installing a judiciary which will be a credit to America and American institutions and to the profession of which we are all proud to belong. As an evidence of sincerity in this regard I am proud to call attention to the standard established by the Chief Executive of the nation in the selection of that eminent statesman and sound jurist, ex-President Taft, as Chief Justice of the greatest court in the world.

Therefore, since the American Bar must furnish the judges for our judicial system, both state and national, and since from its ranks must come that vast concourse of young lawyers in the future who shall be the educative influence to mold public opinion in sound notions of government, it is of deep and grave concern to our republic that the ranks of the American Bar shall be recruited with young men who not only have the moral character that shall make them trustworthy in handling a client's cause, but shall have that moral and intellectual endowment that shall make them able to respond to every call of their country.

From the American Bar comes its judiciary. The wise selection of judges must, in great measure, depend upon the Bar.

Politics is and should be purely incidental to the selection of the judiciary. Character, reinforced by a trained intellect and learning, fortified by moral uprightness and courage, and sustained by a clear vision of the serious responsibility of the judicial office, is a requisite that every judge should possess who sits in judgment in our country. I believe that this government will stand as indestructible as our mighty hills and majestic mountains, and that there shall continue to flow from its judicial office for our people as copious as the waters of our streams and rivers. I do not believe that any branch of our government will fail, but to the judiciary, more than to anything else, we must look for the preservation and perpetuation of our form of government. A wise and courageous judiciary, resting on the confidence of the people, will save it from disintegration, revolution and destruction.

ADDRESS OF WILLIAM L. FRIERSON,  
FORMER SOLICITOR GENERAL OF THE UNITED STATES.

Most intelligent people, of course, understand the difference between a profession and a trade. I am not sure that I do. Reference to the dictionaries has left me in some confusion.

Among other definitions, a profession is defined as "the business which one professes to understand and to follow for subsistence." But a trade is defined by the same dictionary as "the business which a person has learned and which he engages in for subsistence." The only distinction which seems to be implied is that one who follows a trade has really learned his business while to follow a profession one need only profess to understand it. Professional pride forces me to look elsewhere for the real distinction.

Of course, a profession is a useful avocation by which one lives. But so is commerce, agriculture or mechanical trade.

In accepted terminology one practices a profession and plies a trade. But who, under modern conditions and methods, can clearly explain the difference between practicing and plying.

We are accustomed to assume that there is a peculiar dignity which belongs to a profession but not to a trade. But the line which the laws of social cast anciently drew, in some countries, against those engaged in trade, does not exist in democratic

America. And, in this practical age, who, except perhaps, lawyers themselves, regard the most eminent lawyer as occupying a more dignified station or commanding a more general respect than the merchant prince or the king of finance?

Mental, as distinguished from physical, labor predominates in professional work. But so it does in managing and directing a mercantile or manufacturing business or in the work of a broker, or an accountant.

Importing to accepted standards, are not journalism, teaching, agriculture, and engineering, professions? By what authority may we dispute, especially since the advent of income and excess profits taxes, the pretensions of accounting to that dignity? Is there any recognized reason for not classing a banker as a professional man except, perhaps, that, disdaining both profession and trade, he prefers to have it said that he is in finance?

Frankly confessing my inability to clearly define a profession, I shall not attempt to do so except to say that one unailing distinction between a trade and a profession is that no one has yet thought it necessary or polite to suggest an eight-hour day for the professional man.

Without disputing the present right of any honorable calling to be classed as a profession, I fall back on the ancient designation of theology, medicine, and law as the three learned professions. These have, by long-continued usage, by immemorial custom, and by prescription, acquired the indisputable right to be called professions. If not now the only professions, they are, at least, the standard types. And I shall content myself with emphasizing some of the things which distinguish them from other avocations.

They are avocations in which one attends to the business of others rather than his own. They are concerned with the lives, the liberties, the legal rights, the domestic relations, and the souls of men and women. The dignity and honor and nobility which belong to them are due to the learning, knowledge and high character they require, but chiefly to the fact that they are devoted to the service of mankind in the things which touch most intimately human relations and happiness and which are of most vital importance to the world. The price of real eminence, in any

of them, is arduous and continued labor, unselfish consideration for the rights and interests of others, and unyielding integrity and faithfulness.

The minister of the gospel, obeying an imperative call to self-denying service, cherishing the good and the pure, seeking knowledge of things divine, striving to lead men and women in the ways of righteousness, making the redemption of mankind and the saving of souls his chief concern, holds the exalted office of God's Ambassador to earth. His mission, though the least attractive to unregenerate and unconsecrated man, is, in the eyes of all who believe in the immortality of the soul, the noblest of all.

The medical profession gives to the world the physician. He is man's earliest and last earthly acquaintance, the silent repository of the most delicate secrets of life and the home, the medium through whom God brings to the service of man all the curative and restorative agencies with which the works of creation abound. He is a warrior, thoughtless of his own life, leading the hosts of science against hostile diseases bent on the destruction of human life, a missionary preaching the gospel of redemption from habits which destroy the body. Wearing worthily and keeping spotless the immaculate vestments of a profession whose sacred mission is to protect and prolong life and relieve suffering, and whose service to man precedes the cradle and ends with the grave, he is, in the company of earth's most exalted, among his peers.

Even in the presence of those whose lives honor these two great professions, the lawyer, who measures up to the standards of his own profession, may walk with no sense of unworthiness and with a just pride in his calling. Like them, his business is to serve others. His capital is the confidence and respect which he is able to command. The instrument with which he works is knowledge. He is a trusted adviser and a composer of troubles in every walk of life. The seal of professional confidence makes safe in his keeping secrets which, if disclosed, would ruin reputations, wreck homes, destroy fortunes, and bring shame and humiliation. His duty exacts that measure of unselfishness which always puts the interest of his client above his own. His is the guiding hand and his the brain which direct large business

enterprises in the ways of legal safety. To adequately perform his function, he must have a wide knowledge, or at least know how to quickly inform himself, of the things which affect all lines of business and human endeavor. His advice is accepted where a mistake on his part may mean disaster. Upon him is the responsibility of asserting and protecting all civil rights and defending those whose lives and liberties are in jeopardy. And, for the faithful performance of duty and discharge of responsibility, he gives to no man any bond save his membership in the legal profession.

Neither the ministry nor the medical profession requires stricter integrity or greater faithfulness than the legal profession. And neither of them requires so wide a range of knowledge or so much sound judgment on so many questions.

But there is no one phase of the profession of the law which is peculiar to itself. This is a land ruled by law. Our people are not governed by the arbitrary will of any man or official. The law is above all and all are subject to its control. Our law-making bodies are controlled by restrictions imposed by the supreme law of written constitutions. No administrative officer, high or low, has any power except such as is conferred by constitution or statute. Legislative bodies enact laws for the government of the people. But we are governed by them only to the extent that the judicial power holds them consistent with the Constitution and as that power interprets them. We speak of the executive as the branch of the government which administers the law. But not even the President of the United States can inflict upon any individual the slightest punishment for a violation of the laws of the United States, except by authority derived from the judgment of a court. Every act of an administrative officer, which involves the rights of individuals, is subject to judicial review.

We are accustomed to speak of the three coordinate branches of the government. In the sense that each is supreme within the sphere assigned to it by the Constitution, they are coordinate. But when it is the judicial branch of the government which determines the limits of these spheres, when that branch is authorized to determine what the law, under the Constitution is,

regardless of the expressed legislative will, and when the laws can be executed by the executive only through the judgments of the courts and as interpreted by them, it is idle to say that all other governmental power is not in reality subordinate to the judicial power. The supreme power of our government is, therefore, vested in the Supreme Court of the United States. And this is as it should be, for in no other way, could we have truly a government of laws and not men.

Thus the very nature of our government gives to the legal profession a public character and a peculiar dignity and importance which belongs to no other profession, trade, or calling. The judges, of necessity, come from our ranks and we may, therefore, claim, with justice, that the ultimate power of our government is, at last, wielded by our profession. The distinction that comes from our relation to the government is not confined to those of our members who are elevated to the Bench. We are all sworn officers of the courts in which we practice. As advocates for our clients, we have a part in shaping the jurisprudence of the country. In our relations to the courts, we are ministers of justice. The importance of our part in the administration of justice is, I think, second only to the part of those who are charged with the responsibility of rendering judgment. There is, it seem to me, no higher privilege which comes to busy men than that which is the practicing lawyer's when he stands at his place at the Bar, and of right, unawed, and without fear or fawning, boldly insists upon the application of the principles of justice to great interests, or asserts human rights and demands their protection. As long as free government and the rule of law shall last, as long as justice is administered, the lawyer's station in life will be a proud and honorable one, and to be a worthy member of the legal profession will be a badge of distinction.

In such a profession there is no room for fellowship with the dishonest, the unfaithful, the untrustworthy, or the unpatriotic, and no useful place for those who are ignorant or inadequately prepared.

It is our duty to the public, to the government, and to our profession to guard jealously professional standards and ideals, and to see that they are kept high and clean.



ADDRESS OF GEORGE WHARTON PEPPER,  
U. S. SENATOR FROM PENNSYLVANIA.

THE OBLIGATION OF THE LEGAL PROFESSION TO IMPROVE THE  
ADMINISTRATION OF JUSTICE.

One of the most agreeable elements in such a gathering as this is the obvious unity of purpose with which we have come together. Our professional experiences have been similar. Our common desire is to serve the republic. Our immediate problem is to draw wisely upon this body of experiences which we share and then to give abundant vitality to our conclusions. To justify our resolutions we must make them live and we must set them to work. We are not the kind of men who are content merely to pass resolutions and then consign them to whatever fate may be in store for the contents of those elaborate devices for concealment known as office files.

To make our resolutions live and work, we need not only a continuation committee, but we need also the kind of zeal of which we are all capable when once we realize that we are enlisting for a great public service. The saving formula is a good committee plus the enthusiasm of an awakened Bar.

Now it often happens in life that the reason for our lack of enthusiasm in some important cause has been our failure to take our own thoughts out and look at them. If we can once objectify our thinking, honesty may compel us to develop an enthusiasm for definite action or else suffer a shrinkage in our moral stature.

I suppose we have all at times thought of law as the body of rules for playing the game of life. As life is the one experience which we all share and as a happy life is our common aspiration, it follows that enormous importance attaches to the rules of the game. They must be ascertained and they must be enforced. The people who are engaged in ascertaining and enforcing the rules are called *lawyers*. The game of life can't proceed happily unless lawyers do their work and do it well.

From the very nature of the case every lawyer is concerned in the way that every other lawyer functions. The rules of the game of life must be ascertained and enforced to the satisfaction of the entire community or else the orderly progress of the game will be interrupted.

Moreover the profession is necessarily a close corporation and a self-perpetuating body. Nobody can practice law unless other lawyers are willing that he shall. Anybody may practice law whom other lawyers are willing to tolerate. Therefore the business of ascertaining and enforcing the rules of the game will be conducted just as well as the Bar want it to be conducted and no better. Clients may be vaguely dissatisfied. The public may be uneasy and suspicious. But clients and public are practically helpless in the presence of evils and abuses. All legal reforms necessarily originate with the Bar. We alone have the opportunity. Therefore ours is the responsibility. If the American Bar is a dynamic body we are not going to live longer in the presence of a responsibility undischarged.

The responsibility of wisely and rightly ascertaining and enforcing the rules of the game and fitting our successors to carry on our work is a public service of the first magnitude. I know of no other that outranks it. To recognize it distinctly as a public service is highly important, because by so doing we meet and dispose of the contention that standards of fitness should be relaxed to accommodate the infirmities of worthy but untrained young men. We are too intelligent to do this in the case of pilots or railway engineers or base-ball umpires or guides for the forest or for snow-capped mountains. The young man must qualify for public service. We do not sacrifice the public interest by good-naturedly giving him a license and turning him loose. This seems obvious; but we all have heard arguments in justification of inadequate legal training which, if applied to the navy, would have made limitation of armaments long ago unnecessary—because every ship by this time would be upon the rocks.

This Conference seems to me to be epoch-making, because we, as representative American lawyers, have for the first time definitely recognized the public responsibility of the profession and we are taking measures to discharge it. We have reached down into our minds—we have brought forth our thoughts—we have placed them before us in their startling simplicity—and the process has furnished us with our educational ideal—because an ideal is nothing but an objectified idea.

From this time onward the character and educational fitness of young lawyers is going to be a matter of vital concern to us—

because nobody will discharge this public duty if we fail. The happiness of American life—the welfare of American communities—is largely in our hands. We are awake to this fact and its significance is our inspiration.

We are going to give continuous and anxious thought to the best way in which to bring the law school student into personal contact with practicing lawyers; because we know that almost every young lawyer will practice after the manner of some older man. It is largely a problem of hero worship. We mean to make the sacrifices of time and effort necessary to subject the student to the dominating influence of those in whose hands the traditions of the profession are known to be safe.

But we are not going to be content with moral excellence unless it is supplemented by adequate educational equipment, because we know by experience that the wise may be kept unduly busy repairing the mistakes of the good. We mean to use all our influence to establish fixed and definite educational standards to which a man must conform if he wishes to qualify as a public servant. We are convinced that under existing conditions it is in the law school that the lawyer must be trained for service. We are willing to face and live down the criticism of those who tell us that we are planning an undemocratic Bar. We are not going to be turned from our purpose by those who hold that young men should be permitted to walk into law schools from the street and that a youth can acquire a legal training in a fit of absent-mindedness.

We know that before a young man begins to study law he ought to have made appreciable progress in acquiring those two capacities fundamental to his equipment—one, the capacity for abstract thought; the other, the capacity to use with exactness language as a vehicle of thought. The development of these two capacities, abstract thinking and language consciousness, should be the aim of every college curriculum worthy of the name. We err on the side of laxity when we content ourselves with insistence on two years of such work.

Then when the young man actually enters the forest of the law, we mean to insist that among his teachers there shall always be some who are living their whole life in the woods—guides whose whole time is spent in teaching wood-craft. No one mind

can embrace the whole of the common law—let alone our American amplifications of it. Therefore the American lawyers' work is largely explanatory. He must know the wood signs. He must develop that instinct of direction which makes the Indian at home in an unknown wilderness. We lawyers are daily relating ourselves and our clients to an economic and social environment which has changed almost over night. This makes our work the most fascinating work in the world: but to do it to public satisfaction makes a heavy demand on real ability; while to train those who are to carry on means effort on our part and patient endeavor on theirs.

But, gentlemen of the Bar, you are equal to the task. You might not be willing to make the effort for yourselves. You might even hesitate to do it for the sake of the student. But when America calls each one of us answers "*Adsum.*"

And America is calling today. She reminds us of the complications of our national life. She begs us to ascertain and enforce the rules of the game. She bids us contemplate also the hitherto impenetrable forest of international relationships and she challenges us to find the trail. And for our encouragement she tells us that we need not be daunted—because we are of the same goodly fellowship as those great American lawyers who at the Washington Conference found the world wandering aimlessly in a wilderness—trackless and seemingly impenetrable—and were yet able to give it direction and start it once more on its way back to civilization. My brethren! Let us show ourselves worthy colleagues of such great public servants as these!

ADDRESS OF WILLIAM DRAPER LEWIS,  
OF PENNSYLVANIA.

A METHOD OF BRINGING LAW SCHOOL STUDENTS IN TOUCH WITH  
PRACTICING LAWYERS OF HIGH PROFESSIONAL IDEALS.

We often hear it said that young men coming to the Bar today are ignorant of, or indifferent to, correct standards of professional conduct. But I wonder if those who have not had frequent contact with young lawyers, other than those employed in the best law offices, know how serious conditions really are. All but the first six years of my professional life have been spent

as a law teacher in a large city. I therefore know the average young lawyer. I do not say that conditions are worse or better than they were 25 years ago. In my own city of Philadelphia perhaps they are slightly better; but that is only one city, and the facts may justify the very general feeling that moral conditions at the Bar are not improving. Neither do I know whether the average morals of those now being admitted to the Bar are better or worse than the morals of the older members of the Bar. The young man about to be admitted has not yet had an opportunity to promote needless litigation, swindle his clients or deceive the court. But I do know that present conditions are serious—more serious than most of you realize. Many law students today being admitted to the Bar lack that informed conscience and will to maintain high standards of conduct which are essential if they are ever to become as lawyers what they should be—promoters of justice.

There are three forces which tend to make better the moral character of the law student—hard legal study, a knowledge of legal ethics and personal contact with lawyers of high character.

The mere fact that one man knows more than another does not of necessity make him more sensitive to moral impulse. Mastery of the science of the law, however, comes only with hard study, and the student who acquires the habit of working out a legal difficulty until he solves it usually acquires at the same time moral integrity. The man who as a law student is unwilling to be dishonest with himself, refusing to pretend to know when he knows he does not know, as a lawyer is rarely dishonest in his dealings with court or client. Hard students who acquire a real mastery of the law are occasionally rascals, but not often. It is a frequent experience, and one of the satisfactions of the life of a teacher of law, to see the indifferent young man of the first year, as his interest in his studies increases, grow stronger morally as he grows stronger intellectually.

Again, full knowledge of the ethics of the profession is of course important. The moral impulse to do right is of little avail if the conscience lacks a knowledge of the right. Rules of correct professional conduct are or ought to be the result of practical experience of that conduct which tends to promote the administration of justice. Some of these rules of conduct come

to us instinctively, but others and their reasons have to be explained. Bar associations are, therefore, amply justified in insisting that law schools conduct formal courses in legal ethics, even though the experience of most law teachers shows that it is not less important, as occasion arises in the course of class-room instruction on matters of substantive law practice, to drive home an ethical rule by a practical illustration.

Formal instruction in correct professional conduct, however, as well as practical illustrations of the application of ethical rules, will often fall on barren soil, unless the law student is subjected to the third force to which I have referred—personal contact with lawyers of high professional ideals. For good or ill our moral character is affected—in most cases profoundly and permanently affected—by the impressions made on us as boys and young men by parents, teachers and friends. There is no educational substitute for the effect on law students of personal contact with lawyers who themselves jealously maintain the best traditions of the profession. All present systems of legal education fail to provide adequately for this contact.

The office system of legal education always had its serious defects as a method of teaching principles of law. But when the lawyer, even in the cities, usually had his office on the ground floor of his dwelling, when the non-existence of typewriter, stenographer and the title insurance company, made the student who could copy legal forms of some real use to his preceptor, the office system did supply this important element of personal contact between present members of the Bar and those who were seeking admission to the profession. The preceptor came into personal contact with the law student, and the law student not only knew his preceptor well, but in connection with his preceptor's business acquired an acquaintance with other members of the Bar.

Legal education in the past 40 years has made great advances. The graduates of our schools, even of those schools not ordinarily considered of particularly high grade, probably know more law, and have a clearer understanding of legal principles, than most of the students admitted to the Bar from 1825 to 1876. As stated, however, our present systems of legal education lack what the office system in its best days had—the element of personal

contact between the Bar and the law student. We are admitting each year hundreds of young men who cannot be said to know a single member of the Bar or the court to which they are admitted; indeed, in our larger cities there are many young members of the Bar who may practice for several years without having any real personal acquaintance with any lawyer whom a judge, mindful of good legal traditions, would think of appointing a member of a Bar admission committee. And yet, in spite of this fact, some lawyers wonder why so many young practitioners look upon the practice of law as a mere money making trade.

The important task of those who would do something to strengthen the moral character of law students is to restore to our system of legal education this element of personal contact between students and lawyers of high professional ideals, without losing what we have gained on the intellectual side by the establishment of the good law school. There is no reason why this should not be done, provided the Bar recognizes the importance of doing it, and also recognizes two facts; first, that it cannot be done by restoring in whole or in part the system of law student registration in a lawyer's office; and, second, that it cannot be done by throwing the responsibility for doing it entirely on the law schools.

The system by which a young man learned law in a law office has been dead for decades. The illusion that it still exists is one of those things that impede legal educational progress. To sit in a lawyer's office and read a law book, or to act as his typewriter or stenographer, is not to "go through a law office" in the old sense of the word. The so-called office student of today learns his law not in the law office, but in the afternoon or evening law school. The law student has not left the law office, the law office has left the law student. In the modern law office there is a place for a typewriter, a bookkeeper and a clerk; there is a very real place for the law school graduate who is well-grounded in legal principles and knows how to find the law; but there is no place at all for the young man who wants to sit around and pick up the odds and ends of practice while he reads examination cram books or good or bad legal text-books. To attempt to secure some personal contact between the Bar and law students, by requiring that part of the student's time shall be spent in a

lawyer's office is worse than useless. In most cases personal contact between preceptor and student will not result, and in many of the few cases in which it will be secured the contact will not be morally stimulating to the student. Most law teachers will testify that the student on whom no moral impression can be made is the student who is having some "experience" in a law office, the reputation of which is not all that can be desired. Furthermore, the requirement of office registration may be so worded as to prevent, or make it difficult, for the student to obtain adequate legal training in a good law school.

On the other hand, as stated, we cannot throw the responsibility for introducing into our modern legal system the element of personal contact entirely on the faculties of our law schools. True, any teacher of law worthy of the position he holds can count among his students many whose personal friendship he will always retain. The number of students, however, which any law teacher can really know is limited; and what is more to the point, this limit falls far short of the number he can teach with efficiency. Thus a group of six or seven resident law teachers, that is, teachers, who are not in active practice and who devote their time to their work as teachers, can instruct with reasonable efficiency from 300 to 500 law students. On the other hand, they cannot really know that number, neither can any one of them really know one-sixth of that number. What actually takes place in our leading law schools today is that there is in each school a group of 20 to 60 students who have a more or less intimate personal acquaintance with one or more members of the faculty. The remainder, among whom are many of those who need the influence of personal acquaintance the most, do not have it. This is not the fault of our law teachers. You cannot expect law teachers to carry on the research and study necessary to teach their subjects effectively and also to have time to come into distinctly personal contact with a large number of their students.

And there is another reason why even the more modern law school cannot of itself fully supply this essential legal educational element of personal contact between law student and lawyer. Grant that the man who devotes himself to teaching law is as a rule a better teacher than the man who has to free his



mind from the cares of his practice before he enters the class-room; grant that today among law teachers will be found some of the best known and leading members of the legal profession; the fact remains that the profession, though a learned profession, is primarily a profession composed of practitioners, and the young man coming to the Bar of a particular court should know and be known by some at least of those who already form the Bar of that court. We must not forget that the old office system at its best not only brought the law student into contact with his preceptor, but gave to the leaders of the Bar some knowledge of the young men studying for admission in the various offices.

The problem of introducing into our legal educational system the element of personal contact between law students and members of the Bar of high professional ideals, while it cannot be solved by attempting to return in whole or in part to the old office system, or by throwing the responsibility for solving it on the schools, can I believe be solved by a united effort on the part of bar associations and law faculties. The definite suggestions I am about to submit may be defective, but I have a firm belief that only by cooperation between interested members of the Bar and law teachers can we surround the modern law student with those influences which will tend to create in him an effective desire to maintain the best traditions of our profession.

My suggestions are these:

1. State or local courts or state or local bar associations, as may best suit particular conditions, to appoint legal educational committees: In large centers of population, the number of the members of the committee to be about one-tenth or one-fifteenth the average number of registered law students in the territory for which the committee is appointed.

2. No person of whose moral character the committee is not reasonably assured to be allowed to register or continue to be registered as a law student, or to be given the right to take a final examination for admission to the Bar.

3. All applications for registration as a law student to be made to the committee, no applicant to be registered until a report has been made to the committee concerning him by a member of the committee especially appointed to become personally acquainted with him.

4. On registration each student to be assigned to a member of the committee; a substantially equal number of students being assigned to each member. The duty of the member to whom a student is assigned being, to keep in touch with him, become acquainted with him, obtain reports concerning him from the faculty of the law school he attends, and make annually a report concerning him to the committee.

5. The committee from time to time to arrange for receptions, dinners, or other joint meetings of the members of the committee, the registered law students and such members of the Bench and Bar as may be invited; such meetings as far as practicable to be arranged at Christmas or other law school vacation period, so that they may be attended by the students without interference with their studies.

6. The committee to take any other steps they may deem advisable to promote a real acquaintance with and a correct professional feeling among those studying for the admission to Bar.

If these suggestions have any value, it is not that in practice their operation will keep all undesirables from the Bar, but rather that their operation will tend to make those who are admitted aware of the tone and spirit which should guide a member of our profession in his relations with courts, with other members of the Bar, and with the public. They are based on the assumption that it is easily possible for a man in active practice to have at his home or at his club a group of 10 or 15 young men two or three times a year, to encourage them to see him for advice, and to attend one, or possibly two, meetings at which he will have the opportunity of introducing his students to other members of the committee and of meeting their students. The suggestions are also based on the assumption that the courts, or the presidents of the bar associations or other appointing powers in the different states, counties and judicial districts, can find the necessary number of members of the Bar sufficiently interested in those preparing for the profession to make the sacrifice of time involved.

Not long ago I was taking lunch with some members of the Chicago Bar. They were speaking of the lack of professional ideals among the younger members of the Bar, and were frankly pessimistic of any possibility of improvement in view of the

number seeking admission and their heterogeneous character, a considerable percentage having foreign-born parents.

Nevertheless, while recognizing difficulties, I am convinced that a great improvement is possible, even under conditions prevailing in such large and cosmopolitan centers of population as Chicago and New York. In Chicago in 1919 there were 244 persons admitted to the Bar by examination; in 1920, 317; in 1921, 380; or a total of 941 in three years. Doubtless many of those admitted did not intend to practice in Chicago; on the other hand, some who did intend to practice failed to pass the examination. We may fairly assume, therefore, that, as the period of law study is three years, the number admitted in that period is about the number of law students seriously pursuing the study of law in Chicago, with the expectation of practicing law in that city, though of course there are many law students attending Chicago law schools who intend to practice elsewhere. If there are in Chicago about a thousand law students who should be brought into personal contact with members of the Chicago Bar of good moral character, the committee here suggested would probably have to be a committee of 100 members. But it must be remembered that the membership of the Bar in Chicago is correspondingly large. It will not, I believe, be unreasonably difficult to secure 100 members of the Bar of that city sufficiently interested in young men to make the slight sacrifice of time which membership on the committee would involve.

The problem in New York City is substantially the same as that in Chicago. In greater New York 295 persons were admitted by examination in 1919, 384 in 1920 and 349 in 1921, or 1028 in the three-year period. No other locality presents serious difficulty. In the third city in population—Philadelphia—there were only 229 law students admitted by examination in the past three years. In that city a committee numbering 20 or 25 would be sufficient to give a thorough trial to the plan here proposed. Thus, even in our cities, the problem of bringing law students into contact with members of the profession of high ideals is not unsolvable provided the legal profession as organized in state or local bar associations realizes the importance of finding a solution.

The moral educational importance of personal contact between the best now at the Bar and the law student can hardly be exaggerated. Do you wish to maintain the law as a profession? Then realize: You cannot maintain the practice of the law as a profession unless you have among the members of the Bar ideals of service and of courtesy. You cannot maintain these ideals unless those lawyers who now have them are willing to take of their time to see that the young men who seek admission to the profession are thrown under influences which will tend to produce them. The responsibility for the morals of law students should not be thrown entirely on the law schools. As a law teacher, I tell those of you who are on the Bench or in active practice that in our work of teaching law we need your friendly counsel and advice; but that in creating about our law students the proper moral professional atmosphere we need more than that—we need your intelligent cooperation and help. The suggestions here made may be faulty. If so, modify them. But let us start here in this Conference to get together to do something to strengthen the moral character of the future members of our profession.

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(Names of Alternates are printed in *italics*; delegates and alternates in attendance have been indicated by an asterisk.)

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- CLEVELAND BAR ASSOCIATION: \*Paul Howland, \*George B. Harris, J. M. Ulmer, S. C. McMahan.
- FRANKLIN COUNTY BAR ASSOCIATION: \*Boyd B. Haddox.
- HURON COUNTY BAR ASSOCIATION: G. Ray Craig, Ralph Parkhurst, L. W. Wickham, J. R. McKnight.
- LICKING COUNTY BAR ASSOCIATION: Edward Kibler, Frederick Black.
- MAHONING COUNTY BAR ASSOCIATION: Paul J. Jones, U. C. DeFord, Clyde W. Osborne, Edward E. Miller.
- OHIO STATE UNIVERSITY: \*George W. Rightmire.
- RICHLAND COUNTY BAR ASSOCIATION: \*Harry F. Bell.
- OKLAHOMA, STATE BAR ASSOCIATION: \*J. C. Monett, \*H. D. Henry, Ben Martin, J. G. Ralls, J. S. Davenport, \*Paul A. Walker.
- UNIVERSITY OF OKLAHOMA: \*J. C. Monett.
- OREGON, STATE BAR ASSOCIATION: Charles L. McNary, \*Will R. King.
- PENNSYLVANIA, STATE BAR ASSOCIATION: \*Robt. Von. Moschzisker, \*Thomas Patterson, \*William Draper Lewis, \*A. M. Holding, \*J. Franklin Shields, \*Harold B. Beidler.
- ALLEGHENY COUNTY BAR ASSOCIATION: \*Edwin W. Smith, \*A. M. Thompson.
- BEAVER COUNTY BAR ASSOCIATION: \*William A. McConnel, \*W. S. Morrison.
- BUCKS COUNTY BAR ASSOCIATION: Oscar O. Bean, \*Henry A. James.
- CAMBRIA COUNTY BAR ASSOCIATION: \*John W. Kephart, \*Francis J. Hartmann.

PENNSYLVANIA, DAUPHIN COUNTY BAR ASSOCIATION: \*William M. Hargest, \*Charles C. Stroh, \*John E. Fox.

DELAWARE COUNTY BAR ASSOCIATION: William I. Schaffer, J. C. Taylor, *Howard E. Hannum*.

ERIE COUNTY BAR ASSOCIATION: Charles H. English, Albert O. Chapin.

FAYETTE COUNTY BAR ASSOCIATION: \*L. B. Brownfield, \*Charles A. Tait.

INDIANA COUNTY BAR ASSOCIATION: D. B. Taylor, John A. Scott.

LACKAWANNA COUNTY BAR ASSOCIATION: \*Cornelius Comegys, \*Wm. J. Fitzgerald, *S. B. Price*, \*C. B. Little, \*Joseph O'Brien.

LANCASTER COUNTY BAR ASSOCIATION: \*Charles I. Landis, \*John A. Nauman, \*Bernard J. Myers.

LEHIGH COUNTY BAR ASSOCIATION: \*Fred B. Gernerdt, \*James L. Schaad, *R. L. Stuart*, *Orrin E. Boyle*.

MONROE COUNTY BAR ASSOCIATION: \*J. H. Shull, \*Chester H. Rhodes, *W. B. Eilenberger*, *Harry Huffman*.

MONTGOMERY COUNTY BAR ASSOCIATION: William Righter Fisher.

NORTHAMPTON COUNTY BAR ASSOCIATION: William S. Kirkpatrick, William H. Kirkpatrick.

NORTHUMBERLAND COUNTY BAR ASSOCIATION: \*Harry S. Knight, Voris Auten.

PHILADELPHIA, LAW ASSOCIATION OF: \*Hampton L. Carson, \*George Wharton Pepper, *John Hampton Barnes*, \*Charles L. McKeehan.

PHILADELPHIA LAWYERS' CLUB: R. Stuart Smith, \*Robert P. Shick, William Clarke Mason.

WASHINGTON COUNTY BAR ASSOCIATION: Alexander M. Templeton.

WESTMORELAND COUNTY LAW ASSOCIATION: \*Paul H. Gaither, \*Adam M. Wyant.

WILKESBARRE LAW AND LIBRARY ASSOCIATION: S. J. Strauss, J. B. Woodward.

UNIVERSITY OF PENNSYLVANIA: \*William E. Mikell.

RHODE ISLAND, STATE BAR ASSOCIATION: \*Frank L. Hinckley, \*Alex. L. Churchill, \*James C. Collins.

SOUTH CAROLINA, STATE BAR ASSOCIATION: \*W. D. Melton, \*J. F. Carter, \*J. Nelson Frierson, *R. Beverley Herbert*.

SOUTH DAKOTA, STATE BAR ASSOCIATION: \*A. K. Gardner, John B. Hanten, \*George N. Williamson.

BROWN COUNTY BAR ASSOCIATION: \*George N. Williamson.

TENNESSEE, STATE BAR ASSOCIATION: \*John Bell Keeble, Elmore Holmes, \*C. Raleigh Harrison.

CHATTANOOGA BAR ASSOCIATION: \*Wm. L. Frierson.

KNOXVILLE BAR ASSOCIATION: \*Malcolm M. McDermott.

KNOX COUNTY BAR ASSOCIATION: \*J. Harry Price, \*Malcolm M. McDermott.

TENNESSEE, MURFREESBORO BAR ASSOCIATION: John E. Richardson,  
Jesse V. Sparks, *E. L. Whittaker, J. D. Richardson, Jr.*

UNIVERSITY OF TENNESSEE: \*Malcolm M. McDermott.

TEXAS, STATE BAR ASSOCIATION: Nelson Phillips, F. A. Williams, \*R. E.  
L. Saner, H. L. Mosely, *W. A. Morrison, A. G. Greenwood, T. P.  
Steger.*

DALLAS BAR ASSOCIATION: \*R. E. L. Saner.

UTAH, STATE BAR ASSOCIATION: \*E. M. Allison, Jr., \*W. D. Riter,  
\*George Sutherland.

VERMONT, STATE BAR ASSOCIATION: \*Edwin W. Lawrence, Warren R.  
Austin, William R. McFeeters, \*George B. Young.

VIRGINIA, STATE BAR ASSOCIATION: \*Robert M. Hughes, \*William M.  
Lile, Joseph R. Long, \*Walter S. McNeil.

NORFOLK AND PORTSMOUTH BAR ASSOCIATION: \*Thomas W. Shelton,  
\*Robert M. Hughes.

RICHMOND, BAR ASSOCIATION OF THE CITY OF: J. Randolph Tucker,  
\*C. M. Chichester.

WASHINGTON AND LEE UNIVERSITY: W. H. Moreland, \*James B.  
Noell.

WASHINGTON, STATE BAR ASSOCIATION: Stephen F. Chadwick, Roy C.  
Fox, Charles E. Shepard.

LINCOLN COUNTY BAR ASSOCIATION: Samuel P. Weaver, Louis A.  
Dyer.

STATE COLLEGE: Henry M. Skidmore.

WEST VIRGINIA, STATE BAR ASSOCIATION: George E. Price, \*J. W.  
Vandervort, \*J. Warten Madden, \*George S. Wallace, John J.  
Coniff, *C. W. Campbell, \*Randolph Bias, \*George Poffenbarger,  
\*Ira E. Robinson.*

CABELL COUNTY BAR ASSOCIATION: \*D. W. Brown, \*W. C. W.  
Renshaw, *W. K. Cowden, Harry S. Irons.*

CHARLESTON BAR ASSOCIATION: \*David C. Howard, \*Wm. B.  
Matthews, \*Uriah Barnes.

MERCER COUNTY BAR ASSOCIATION: \*H. C. Ellett, Russell S. Rits,  
\*D. M. Easley, *A. W. Reynolds, Jr.*

MINGO BAR ASSOCIATION: \*Randolph Bias, \*Harry Scherr, *Wade  
Bronson, J. B. Straton.*

MINERAL COUNTY BAR ASSOCIATION: \*Emory Tyler, \*Tyler Morrison,  
\*C. N. Finnell, \*R. A. Welch.

MONONGALIA COUNTY BAR ASSOCIATION: J. G. Lazzelle, \*E. M.  
Everly, \*C. William Cramer, \*Robert E. Guy, \*Terence D.  
Stewart.

OHIO COUNTY BAR ASSOCIATION: Nelson C. Hubbard, \*John C.  
Palmer, Jr.

TAYLOR COUNTY BAR ASSOCIATION: \*Ira E. Robinson.

WEST VIRGINIA UNIVERSITY LAW SCHOOL: \*Thomas P. Hardman.

WISCONSIN, STATE BAR ASSOCIATION: Louis Quarles, \*W. A. Hayes, \*Frank R. Bentley, *Harry S. Richards*, \*John B. Sanborn, John E. McConnell.

DANE COUNTY BAR ASSOCIATION: Joseph E. Davies, \*H. S. Richards.

DODGE COUNTY BAR ASSOCIATION: C. A. Christiansen, Eugene A. Clifford, *Martin L. Lueck*, *William H. Woodard*.

DOUGLAS COUNTY BAR ASSOCIATION: Irvine L. Lenroot, Harold G. Pickering.

MILWAUKEE BAR ASSOCIATION: \*Max. Schoetz, \*Frank T. Boesel.

UNIVERSITY OF WISCONSIN: Harry S. Richards.

WASHINGTON COUNTY BAR ASSOCIATION: \*Carl B. Rix.

WYOMING, STATE BAR ASSOCIATION: C. P. Arnold, W. E. Mullen, \*H. B. Henderson, Jr.

The following members of the American Bar Association were present:

C. A. Severance, President; Frederick E. Wadhams, Treasurer; W. Thomas Kemp, Secretary; Edgar B. Tolman, representing American Bar Association Journal; E. A. Armstrong, New Jersey; Nila F. Allen, District of Columbia; Robert Crain, District of Columbia; Clarence W. DeKnight, District of Columbia; John Warnock Echols, Virginia; Hampson Gary, District of Columbia; James T. Lloyd, District of Columbia; James W. S. Peters, District of Columbia.





# Massachusetts Law Quarterly

AUGUST, 1922

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## REPORT OF THE COMMITTEE ON NOMINATIONS.

*To the Members of the Massachusetts Bar Association :*

We report the following nominations for the coming year :

*For President :*

THOMAS HOVEY GAGE,  
Worcester.

*For Vice-Presidents :*

JAMES M. MORTON,  
Fall River.

FREDERIC DODGE,  
Belmont.

WILLIAM C. LORING,  
Boston.

*For Secretary :*

FRANK W. GRINNELL,  
Boston.

*For Treasurer :*

CHARLES B. RUGG,  
Worcester.

*For Members of the Executive Committee :*

HORACE E. ALLEN . . . .	Springfield.	HENRY M. HUTCHINGS . .	Dedham.
CHARLES F. BAKER . . . .	Fitchburg.	JAMES J. KERWIN . . . .	Lowell.
SAMUEL C. BENNETT . . . .	Weston.	JAMES E. McCONNELL . .	Boston.
EDWARD E. BLODGETT . . . .	Newton.	JOHN G. PALFREY . . . .	Sharon.
HAROLD S. R. BUFFINGTON . .	Fall River.	WILBUR E. ROWELL . . . .	Lawrence.
FRANCIS J. CARNEY . . . .	Cambridge.	FELIX RACKEMANN . . . .	Milton.
MORTON COLLINGWOOD . . . .	Plymouth.	PHILIP RUBENSTEIN . . . .	Boston.
EDWARD T. ESTEY . . . .	Worcester.	FITZHENRY SMITH . . . .	Boston.
FRANK M. FORBUSH . . . .	Newton.	CHARLES N. STODDARD . .	Greenfield.
CHARLES L. HIBBARD . . . .	Pittsfield.	JAMES W. SULLIVAN . . .	Lynn.

The President, Secretary, Treasurer and Retiring President are members *ex officio*.

Other nominations may be made in writing by nine members of the Association, handed to the Secretary in advance of the meeting. Members of the Committee who have served for three years are not eligible.

Respectfully submitted,

EDWARD W. HUTCHINS,

*Chairman.*

*Entered as Second-Class Matter at the Post Office at Boston.*

## REPORT OF THE COMMITTEE ON LEGISLATION.

### *To the Members of the Massachusetts Bar Association:*

A list of statutes of special interest to the bar is given at the end of this report.

In the report of this committee last year, printed in the August number of the "Quarterly" for 1921, the recommendations of the Judicature Commission were discussed and the views of the committee expressed in regard to them. The legislature, during its last session, adopted the substance of a number of these recommendations as follows:

1. Increasing the appropriation for the Supreme Judicial Court. C. 228.
2. Relieving the justices of that court of the custody of the Boston Court House. C. 524.
3. Authorizing the court to transfer equity cases to or from the Superior Court. C. 532.
4. Providing for appellate divisions of the district courts for civil cases throughout the state and providing for an Administrative Committee. C. 532.
5. Increasing the jurisdiction of all district courts to \$3000. C. 532.
6. Shortening probate bonds and records. C. 512.

We renew our recommendations of the following proposals of the Judicature Commission not yet adopted:

1. For a Judicial Council. The Judiciary Committee of the Legislature reported favorably a bill for this purpose upon the petition of this Association filed in accordance with the vote at the annual meeting in 1921, but the bill did not pass.
2. To avoid conflicts of jurisdiction over certain problems of domestic relations (See Jud. Com. Rep. pp. 43 and 141).
3. For the reasons stated in the report of the commission and in our report of last year we recommend the

acts to extend the concurrent jurisdiction of the Superior Court and to allow the justices of that court to be called in to sit as single justices in the Supreme Judicial Court when needed as a further measure of relief for that court. (Jud. Com. Rep. Draft Acts 1 and 3, pp. 133-134.)

4. To avoid the expense of appraisers in the probate courts unless the court orders them (Jud. Com. Rep. p. 146).
5. Procedure for declaratory judgments. The commission's draft of this act (Rep. p. 154) has been criticised by Professor Borchard, of the Yale Law School, in an article in the "Harvard Law Review" (for May, 1921, at p. 700) as too restricted in its provisions. If it should be found to be too restricted in practice, it could be extended later, but we believe the act as reported by the commission after careful consideration to be a wisely guarded provision to begin with. As we suggested in our report of last year, we think the jurisdiction if provided for will gradually demonstrate its usefulness to supplement the limitations of our present more restricted practice in a manner similar to the growth and spread of equity jurisdiction. The long experience in Scotland and in England with such provisions shows that it is not a new experiment. The practical problem in the development of the jurisdiction seems to be to prevent the court from having undigested cases of an academic character submitted to the court in such a manner that their answer is not presented to the court under the spur, and with the assistance, of controversy and in deciding which the court can settle nothing fairly and finally. The discretionary character of the jurisdiction is essential in order to guard against such a misuse of the time of the court.
6. District Court Appeals in Criminal Cases. In our report of last year we said, "We believe the present conditions in the administration of the criminal law described by the commission on pp. 91-97 of the re-

port warrant the trial of such experiments as they suggest." We see no reason to change this statement. A draft of a bill approved by the commissioners was printed in the "Quarterly" for February, 1922.

7. Recommendations 12, 18, and 19. As to these, we repeat what was said in our report of last year as follows:

"The recommendations on which members of the bar are, perhaps, most likely to differ are the proposal to repeal the statute about charging on the facts (No. 12, p. 146) discussed on pp. 85-89 of the report, and the recommendations No. 18 (pp. 151-2) to provide for oral examination of parties before trial and No. 19 (p. 153) relative to the discovery of documents. The reasons for these recommendations appear on pp. 104-113 of the report.

"We recommend No. 19 as to discovery of documents.

"As to the proposal to repeal the statute about charging on the facts, the reasons in favor of repeal are forcibly stated by the commission, but the subject is such a contentious one that we believe more is to be gained by considering the other parts of the report than by debating this subject, and we therefore make no recommendation in regard to it."

There is some difference of opinion in the Committee as to the advisability of the experiment, No. 18, of oral examination of parties before trial, recommended by the commission.

Respectfully submitted,

JAMES A. LOWELL, *Chairman*.

JAMES E. McCONNELL,

HENRY M. HUTCHINGS,

FRANCIS G. GOODALE,

EDMOND G. FORD,

FITZ HENRY SMITH,

FRANK F. DRESSER,

F. W. GRINNELL,

JEREMIAH SMITH,

JAMES M. ROSENTHAL.

I concur in the report but suggest that in view of Section 1 of Chapter 532 of the Acts of 1922, authorizing the Supreme Judicial Court to transfer cases to the Superior Court, the recommendation No. 3, to extend the concurrent jurisdiction of the Superior Court and to authorize the temporary transfer of judges, may be unnecessary.

JOSEPH MICHELMAN.

I approve the report of the committee and should like to add the following:

In connection with Paragraph 3, I favor the recommendations of Lee M. Friedman, Esq., as stated in the Massachusetts Law Quarterly for May, 1922, reading as follows:

"First, let us abolish terms of Court for sittings of the Full Bench. It requires no argument to demonstrate that today when Court sits more or less throughout the year that dividing its sittings artificially into terms serves no useful purpose.

Secondly, the full court should come in and sit for the first two weeks of each month, say for the nine months of the Court year.

Thirdly, in all except extraordinary cases, a full court should consist of three justices. In cases where the three sitting justices fail to be unanimous, a rehearing may be had before all the members of the court."

and I recommend that the Massachusetts Bar Association have introduced in the coming session the bill recommended by the Judiciary Committee of the General Court of 1921, numbered House 1634, to the effect that

"A justice, clerk or assistant clerk of any district court, or a special justice of a district court the judicial district of which has a population of over one hundred thousand, shall not be retained or employed as attorney in an action, complaint or proceeding pending in his court."

ROBERT WALCOTT.

LIST OF ACTS OF 1922 OF INTEREST TO THE  
PROFESSION.

- C. 98. Relative to the authority of district courts to allow the marriage of minors.
- C. 99. That actions under the Small Claims Procedure shall be brought in the judicial district where the defendant lives or has his usual place of business.
- C. 143. Authorizing the charging of interest on belated income tax assessments.
- C. 175. Relative to preferences by persons dying insolvent.
- C. 197. For the current revision of the index to the General Laws.
- C. 202. That appeals from the Registrar of Motor Vehicles shall not operate to stay rulings or decisions.
- C. 228. That the Justices of the Supreme Judicial Court "shall be allowed annually for law clerks, stenographers and other clerical assistance such amount as shall be appropriated by the General Court to be paid by the Commonwealth upon the certificate of the chief justice."
- C. 241. Increasing time for notice to abutters of injuries from snow and ice.
- C. 242. Relative to naming third parties in separate support proceedings.
- C. 272. Relative to voluntary associations.
- C. 290. Relative to information at the source for income taxes.
- C. 305. As to voting residence of married women.
- C. 314. Relative to interrogatories in civil actions. This act was intended to expedite practice in getting interrogatories answered.
- C. 318. Ratifying certain corrections in the General Laws.
- C. 347. Increasing certain legacy and succession taxes.
- C. 360. For taxation of forest products and classification and taxation of forest lands.
- C. 371. As to eligibility of women for elective or appointive offices.

- C. 377. As to witness fees for police officers.
- C. 382. Authorizing abatement and repayment of unwarranted income, succession or corporation taxes.
- C. 397. Relative to temporary orders in non-support, desertion and bastardy cases.
- C. 403. Exempting from legacy tax certain personal property of non-residents.
- C. 408. As to limitation of actions on insurance policies.
- C. 432. That, "A person shall not be held to answer in a district court or before a trial justice to a second complaint for an offence for which he has already been tried upon the merits *in said court or before such justice.*" This act became a law without the governor's approval and the wisdom of it seems doubtful.
- C. 449. As to taxation of excess of gains over losses on exchange of shares in corporate reorganizations.
- C. 458. That written statement of reasons be filed by district attorneys in nol pros cases and in motions to place cases on file.
- C. 459. That district attorneys shall be members of the bar. A referendum petition has been filed and completed on this act which will therefore appear on the ballot at the state election in November. The act seems obviously a reasonable one. The Justices of the Supreme Judicial Court upon being asked for an advisory opinion answered that in their opinion the act *was* constitutional. One of the district attorneys recently removed from office and since *disbarred* is running for re-election in his district and will be voted on at the same election at which the act is voted on.
- C. 461. As to appointment of testamentary guardians for minors by either parent.
- C. 464. As to deposits by sureties on bail bonds and by defendants on personal recognizances.
- C. 465. Relative to bail in criminal cases. (The above acts followed the report of the special commission on the subject of bail, H. of 1922.)

C. 466. That special grand juries shall be summoned in any county upon the written request of the Attorney General "accompanied by a certificate that public necessity requires such action, signed by the Chief Justice of the Superior Court."

C. 479. As to settlement of paupers.

C. 486. This is the Uniform Partnership Act recommended by the National Conference of Commissioners on Uniform State Laws and adopted in several other states. It takes effect January 1st, 1923. In general it may be said that it does *not* make all partnerships statutory creations. On the contrary, the act has two parts:

First, the sections codifying the rules or definitions for ascertaining the existence of a common law partnership.

Second, those sections which codify the incidents of a common law partnership after its existence has been ascertained.

For discussions of this act and its history, see the act with explanatory notes printed by the Conference; an article by the draftsman, William Draper Lewis, Yale Law Journal for June, 1915; a criticism by Judson A. Crane, Har. Law Rev., June, 1915; a reply by Mr. Lewis, Har. Law Rev., Dec., 1915, and Jan., 1916. Report of Committee on Legislation Mass. Bar Assoc. 1915, Appendix, pp. 77-105 and references on p. 105.

C. 489. As to certain deductions from taxable incomes.

C. 493. Permitting certain aliens to take examinations for admission to the bar.

C. 508. That motions for new trial may be granted in *capital* cases at any time before sentence.

C. 509. That "in any action at law or suit in equity in the Supreme Judicial Court or in the Superior Court, the court may on motion for cause shown advance said action or suit for speedy trial."

C. 512. To shorten the forms of probate bonds. The purpose and character of this act is discussed in the Mass. Law Quarterly for May, 1922, p. 42.



- C. 524. Transferring "the care, custody and control" of the Suffolk County Court House from the shoulders of the Justices of the Supreme Judicial Court to the sheriff of the county.
- C. 532. This bill, which deals with various courts, is explained in the Mass. Law Quarterly for May, 1922, p. 22.
- C. 533. Providing for a special Master in the Superior Court for administrative duties relative to assignment of cases, etc.
- C. 542. Abolishing transfer from the Superior to the Probate Court of uncontested divorce libels. This act followed the general grant of concurrent jurisdiction in divorce to the probate courts by C. 532.

Resolves C. 42. Relative to loose-leaf General Laws.

## A WELL-KNOWN CLIENT AND A WELL-KNOWN FIRM OF SOLICITORS.

In Dean Wigmore's article on "Legal Novels", reprinted in the May number of this magazine, after mentioning Samuel Warren's "Ten Thousand a Year" he adds in a parenthesis "*the* book for lawyers by a lawyer." The edition by Jasper Harding of Philadelphia in 1846 contains two illustrations, one a portrait of the celebrated client, Tittlebat Titmouse, Esq., and the other of the equally celebrated firm of solicitors who acted as his advisers—Messrs. Quirk, Gammon, and Snap. Presumably, these portraits, in the costume of the period of 183—appeared in the original English edition as that of Titmouse bears the name of "T. Gibson, London 1841". At all events, they seem likely to interest and entertain those who are familiar with the book and they are here reproduced.

In a paper on "Solicitors' Work and Environment" printed in the first number of the New Cambridge Law Journal and read to the Cambridge University Law Society in December, 1920, by Mr. S. Garrett, Ex-president of the Law Society, in London and a leading solicitor of forty-seven years' experience, he began with the following rather curious comment on some of the characters in Dickens's novels:

"I resent the representations by popular novelists and dramatists of the solicitor as a costs-pursuing pettifogger, if nothing worse. Dickens heads the tribe of libellers with representations which, even as caricatures, are grossly overdrawn. In his celebrated preface and first chapter of 'Bleak House' he discloses his motive, which was the laudable one of the correction of abuses of legal procedure. At the time he was writing (the middle of the nineteenth century) those abuses no doubt prevailed. But I hope I need not assure my present audience that Messrs. Kenge and Carboy, Mr. Tulkingherne, Messrs. Spenlow and Jorkins, Messrs. Dodson and Fogg, and all the rest, however entertaining in works of fiction, are nothing more or less than fanciful romance. They are true to nothing in real

life that I have ever seen. They are no more faithful representations of solicitors than 'the young man of the name of Guppy' is a faithful representation of solicitors' clerks. In his preface to 'Bleak House' Dickens says that he has purposely dwelt on the romantic side of familiar things. In the chapter entitled 'Attorney and Client' he writes:—

'The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity is apt to think it. Let them but once clearly perceive that the grand principle is to make business for itself at their expense and surely they will cease to grumble.'

The romantic side of familiar things! If he had said that this theme was the familiar side of popular ignorance and prejudice he would have been nearer the truth. This ignorance and prejudice he did his best to inflame, not without success. If a tithe of what he wrote on the subject were true no man of honour could follow the profession of the law or encourage younger men to do so. It is certainly a misfortune for the profession that a man of genius, whose writings have dominated a section of the reading public for three generations, should have so persistently held up the profession to odium and ridicule. One derives some consolation, however, from the reflection that Dickens brought up one of his sons to the law, and that that son has attained a prominent and honourable position in the profession which his father habitually calumniated. 'Therefore, if any of you are admirers of Dickens (as I am), do not be discouraged by the picture of the law and of lawyers which he draws. Reflect that it is only the romantic—that is, the fanciful—side of familiar things. I hope that the account which I shall now give you of my own branch of the profession will satisfy you that Dickens's picture is fanciful to the point of falsity.' (p. 43).



**TITTLEBAT TITMOUSE**



**MESSRS. QUIRK, GAMMON & SNAP  
AND  
THEIR CLIENT**

Mr Garrett seems to take Dickens a little too seriously and it is certainly rather a strain on our credulity to ask us to believe that the entire body of English solicitors are free from the traits which Dickens pictured or caricatured. A good caricature appeals to us because we recognize enough truth in it to give it point. Not long ago as I listened to an argument of a member of the bar, I noticed something familiar, and suddenly it dawned upon me that I was listening for the moment to "Sergeant Buzfuz" in the flesh, in tone, manner, emphasis, and substance.

The character of Titmouse which stands out in his portrait and, certainly, the firm of Quirk, Gammon & Snap are not unfamiliar figures to the Massachusetts bar—certainly not, in the light of recent developments in Suffolk and Middlesex Counties.

Some account of the author as well as the history of the book may also be interesting. Samuel Warren Q. C. appears to have been a somewhat eccentric person, but the best recommendation of his books is the fact that so well informed and discriminating a person as Mr. J. B. Atlay, in his "Victorian Chancellors", constantly refers to him and his novel as a reliable and suggestive sources of history and biography. Warren was appointed Master in Lunacy by Lord Chelmsford, who is said to have described him as "half lunatic and half lawyer", which, perhaps, made him specially qualified for the position. At all events, "while professional opinion was by no means unanimous over the elevation" of Warren, yet Atlay tells us that "the author of 'Ten Thousand a Year' discharged his duties to the general satisfaction for a quarter of a century." \*

We get another glimpse of him at the inquiry into the sanity of Mr. William Frederick Windham in 1861-2, at which Lord Cairns, then at the bar, made "his greatest speech before a jury." "It was presided over by Samuel Warren Q. C. himself hardly less eccentric in his vanity than Windham in his vices. 'The eyes of England' he told an admirer 'are following my pen.' "† But this vanity and other peculiarities did not appear in his novel, which reflects his ability, his dramatic power, and his discriminating knowledge of the

\* Atlay, Vol. II, 119.

† Atlay, II, 301.

period of which he writes. As "there is so little anecdotic record of the early days of Lord Lyndhurst", Atlay quotes from the novel an extended interview of "Sir Charles Wolstenholme, the attorney general in that veracious chronicle" as throwing "a good deal of light on the preliminary stages of Copley's career in the law". "Of the identity of Wolstenholme with Lyndhurst" there is no room for doubt" and the passage contains "strong internal evidence that it represents a real conversation between Lord Lyndhurst and some earnest neophyte and we may fairly accept it as a fragment of the chancellor's autobiography." \*

Again we get a possible sidelight on Lord Brougham's use of his patronage as chancellor which "aroused inevitable resentment among the disappointed applicants". Lord Brougham's full title was "Lord Brougham and Vaux" and Mr. Atlay says in a footnote:

"Among his favourites was the notorious Mr. Whittle Harvey, whom he strove, but in vain, to get appointed to the Secretaryship of the Charity Commissioners. I have often wondered how far Samuel Warren had Whittle Harvey in mind when he depicted Mr. Gammon, of the firm of Quirk, Gammon, and Snap, as enjoying the especial patronage of Lord Blossom and Box."—Vol. I, p. 316.

Again Atlay quotes Warren further about Lyndhurst, whose "gifts were those which appeal to the members of his own profession".

"His mind," says Samuel Warren, "was distinguished by its tranquil power. He had a rare and invaluable faculty of arraying before his mind's eye all the facts and bearings of the most intricate case and contemplating them, as it were, not successively but simultaneously. His perception was quick as light; and at the same time—rare, most rare accomplishment—his judgment sound, his memory signally retentive."—Vol. I, p. 15.

This description corresponds with Lord Westbury's answer toward the end of his life when asked at Jowett's table whose

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\* Atlay, Vol. I, 8-10.

was the finest judicial intellect he had ever known and he replied, "Lord Lyndhurst's". A great advocate's appreciation of a great judge is sometimes peculiarly keen because of the contrast of their qualities, and the fact that Westbury was, apparently, greater as an advocate than as a judge gives point to his estimate. An experienced advocate always recognizes a clear judicial mind which can grasp and marshal complicated facts with judgment and without apparent effort, and this was the rare quality of Lyndhurst, as it was of Jessel.

Mr. Atlay also, after referring to the hearing of election petitions by Parliamentary committees after the Reform Bill of 1832, says:

"—a worse tribunal than the old House of Commons Committees in the years immediately following 1832 it would be difficult to imagine. In the Hull case, in 1837, when Thesiger appeared on behalf of the sitting Tory members, William Wilberforce and Sir Walter James, the decisions of the Committee were so flagrantly partial and corrupt that the reporters refused to publish them on the ground that they were not entitled to the slightest authority. If, however, the curious care to turn to the pages of 'Ten Thousand a Year,' they will find the whole story set out, *mutatis mutandis*, in the proceedings upon the Yatton Petition."—Vol. II, 95.

In another place we get a possible portrait of William Tidd, the great author of Tidd's "Forms and Practice", who trained Lord Lyndhurst, Lord Campbell, Lord Cottenham, Lord Truro, and many other nineteenth century lawyers and judges. Atlay says, "of Tidd himself I seem to detect the lineaments in Mr. Weasel, the pleader described by Samuel Warren, though I fancy the portrait, taken as a whole, is composite:

"He was a ravenous lawyer, darting at the point and pith of every case he was concerned in and sticking to it, just as would his bloodthirsty namesake at the neck of a rabbit. In *law* he lived, moved, and had his being. In his dreams he was everlastingly spinning out pleadings



which he never could understand, and hunting for cases which he could not discover. In the daytime, however, he was more successful. In fact everything he saw, heard, or read of, wherever he was, whatever he was doing, suggested to him questions of law that might arise out of it. At his sister's wedding (whither he had not gone without reluctance) he got into a wrangle with the bridegroom on a question started by himself, whether an infant was liable for goods supplied to his wife before marriage; at his grandmother's funeral he got into an intricate discussion with a puzzled proctor about *bona notabilia*, with reference to a pair of horn spectacles, which the venerable deceased had left behind her in Scotland, and a poodle in the Isle of Man (*sic*); and at church the reading of the parable of the Unjust Steward set his devout, ingenious, and fertile mind at work for the remainder of the service as to the modes of stating the case nowadays against the offender, and whether it would be more advisable to proceed civilly or criminally; and if the former whether at law or in equity. He was a hard-headed man, very clear and acute, and accurate in his legal knowledge; every other sort of knowledge he despised, if indeed he had more than the faintest knowledge of its existence."—Vol. II, 132.

Turning now to Dickens, Atlay tells us that Sir Charles Wetherell's cross examination in a case in State Trials XXXII, 284-327 furnished a model for the famous scene in "A Tale of Two Cities." Then turning to "Bleak House"\*:

"The figure of Lord Lyndhurst shines out even through the moral and material fog of Jarndyce v. Jarndyce, as he talks in his private room to Richard Carstone, 'not seated but standing, and altogether with more ease and less ceremony, as if he still knew, though he *was* Lord Chancellor, how to go straight to the candour of a boy.'"  
—Vol. I, 143, 144.

The use by no less a person than Sir William Follett of some harmless-looking letters in the trial of a case against Lord Mel-

\* For the influence of "Bleak House" which began to appear in 1842, see Atlay, I, 450 and note.

bourne—the “William Ashe” of Mrs. Humphrey Ward’s novel—“appealed irresistibly to the fancy of Charles Dickens, who, a few months afterwards, reproduced a colourable imitation of it in the trial scene in *Pickwick*”—the immortal “Chops and tomato sauce” note to Mrs. Bardell.

Other references to Dickens throughout Atlay’s volumes gives us interesting and entertaining sidelights on legal history and fiction and, while, in reading him we should remember the warning that

“sifting evidence was not the forte of one whose warm heart prompted him to listen too confidingly to every *ex parte* tale of wrong, especially when it touched the existence of the new Poor Law, the Government Offices or the Court of Chancery”

and while we all know that Messrs. Quirk, Gammon, and Snap and Messrs. Dodson & Fogg and others do not represent the general professional standards either in England or America, yet, we recognize the unpleasant human traits which always appear in varying degrees in the profession from time to time, and there is no reason for “resenting” the picture of the novelists, as Mr. Garrett does in the passage quoted, especially when contrasted, as in Warren’s novel, with the faithful family lawyer. On the contrary, in view of the current discussion of “legal ethics” there is, perhaps, no better or more pointed literature on the subject than “*Ten Thousand a Year*” and the story of some of the characters in Dickens. The reading of Warren’s novel, at least, might well be suggested to every applicant for admission to the bar as a part of his training in “ethics”.

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F. W. G.

## CRIMINAL APPEALS.\*

(A paper read by Hon. Wilfred Bolster, Chief Justice of the Municipal Court of the City of Boston, before the Massachusetts Branch of the American Institute of Criminal Law and Criminology, April 26, 1922.)

It is possible and desirable to treat such a subject as this with some approach to scientific accuracy. The reports of our Prison and Probation Commissions contain material seldom consulted, almost never digested, from which may be had a view of the activities of the criminal courts over a sufficient period of years to escape the dangers of reliance upon transient phases, and to gain a fairly dependable insight into general trends, disclosed by massed data rather than by such variables as the number of homicides or robberies, the usual foundation for a supposed "crime wave". Too much of our legislation for and practice with the machinery of our criminal law is based upon guess-work. Nothing less than a view as complete as the returns admit of ought to be accepted as the basis of any proposed change, and in dealing with the subject of appeals in criminal cases it is possible to obtain a fairly comprehensive survey.

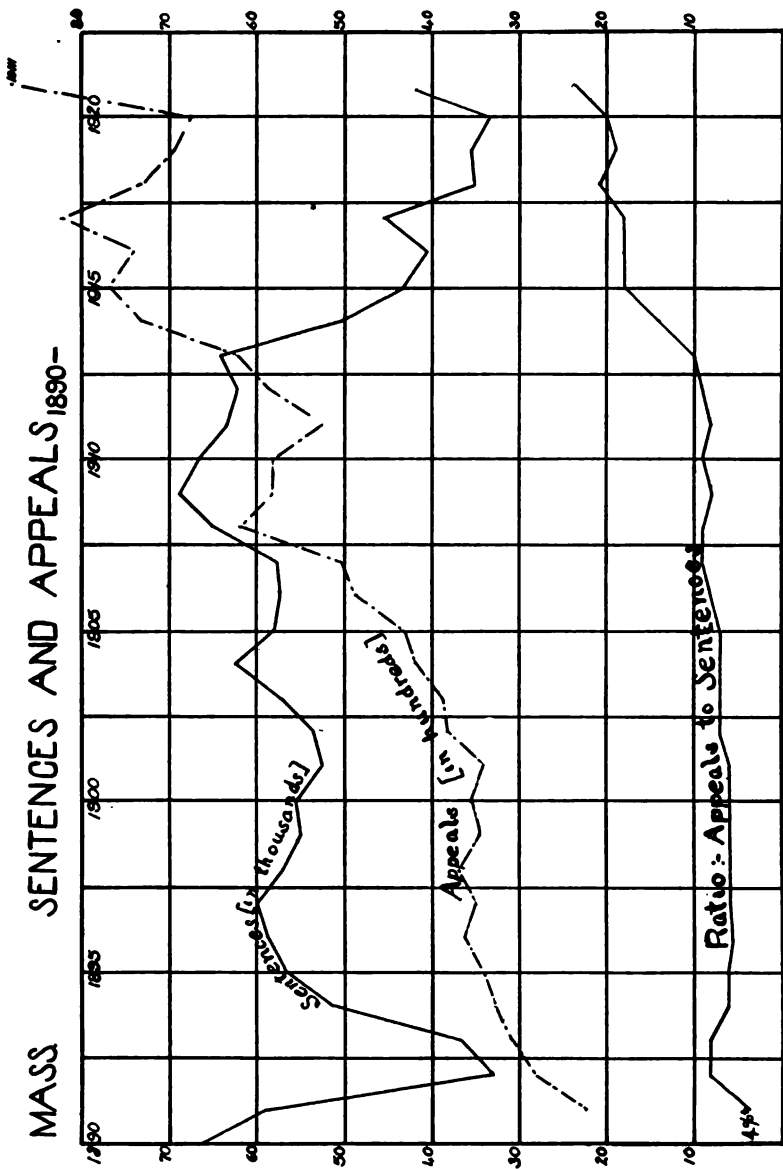
Chart 1 gives a perspective of the situation. A quarter of a century ago the normal percentage of appeals to sentences for the state was 6. In 1920 it was 21. In 1921 it was 24. The great gain is in the last decade. This is not due to local causes, for while Suffolk County shows a three-fold increase from 1895 to 1920, from 9% to 27%, the remaining thirteen counties have increased their criminal appeals four-fold, from 4% to 16%. The fact that Suffolk County has always had a larger percentage of appeals is doubtless due in great part to the absence there of such long intervals as occur in many other counties between criminal terms, dissuading from appeal those who cannot secure bail.

It is the purpose of this paper to analyze this situation, to seek its causes and suggest a remedy. It is first necessary to resolve the sentences which form the material for appeal

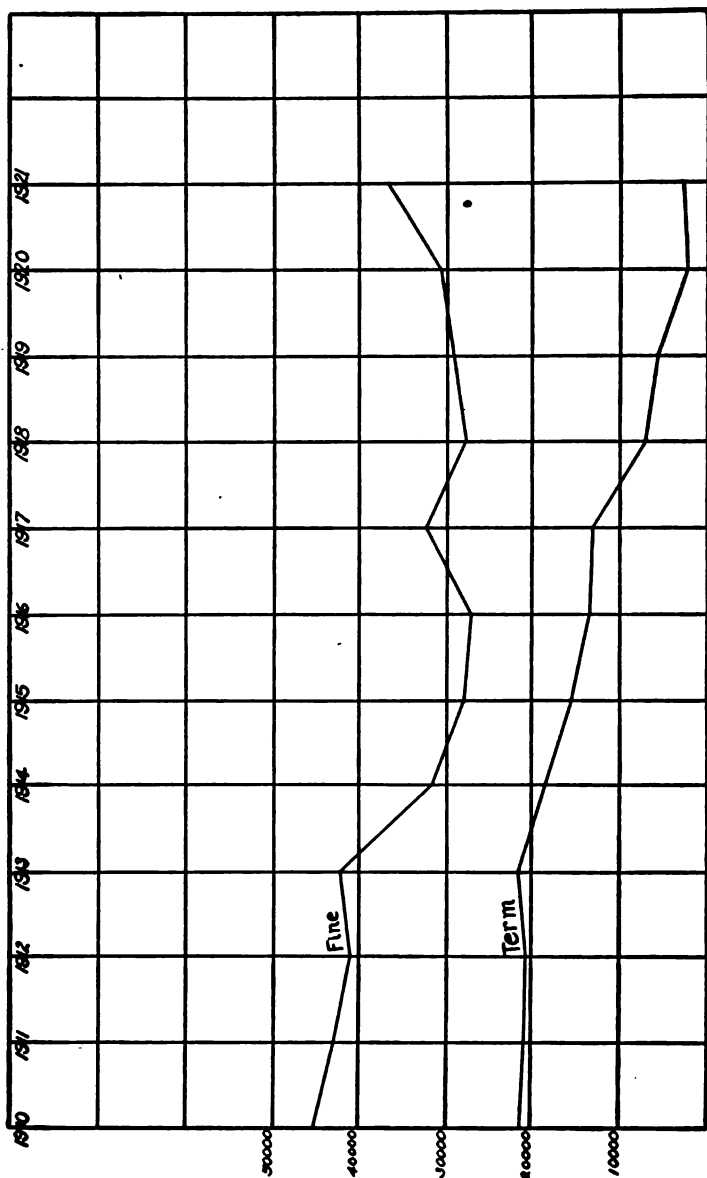
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\* "For sparing justice feeds iniquity."

— *Shakespeare — Rape of Lucrece.*



# MASS. DISTRICT COURT SENTENCES— FINE AND IMPRISONMENT, 1910-



into their component parts. Chart 2 shows the division between district court sentences of fine and imprisonment since 1910, the earliest date available. The significant things are the absolute decline in both fine and imprisonment sentences, in the face of a gradual mounting, prior to the war and prohibition, of the number of cases begun; and the relatively greater reduction of imprisonment sentences, which are always more provocative of appeal. Increased use of the power given district courts to file cases, and the continued growth in use of probation, are but partial explanations of the decline in sentences. More potent still is an increased realization of the fact, for it is a fact, that by and large an appeal means a gain and not a loss for the appellant. The district courts know that as well as the defendants, and react to that knowledge. Note also, by comparison with chart 1, the absolute rise in appeals during this period, and that since 1918 they have actually exceeded the totals of imprisonment sentences. Appeals would be more numerous still were it not for the growing use in the district courts of the suspended sentence, appealable only when first imposed, but not when the suspension of its execution is revoked. More and more defendants however, are, by advice of counsel, refusing to accept such sentences.

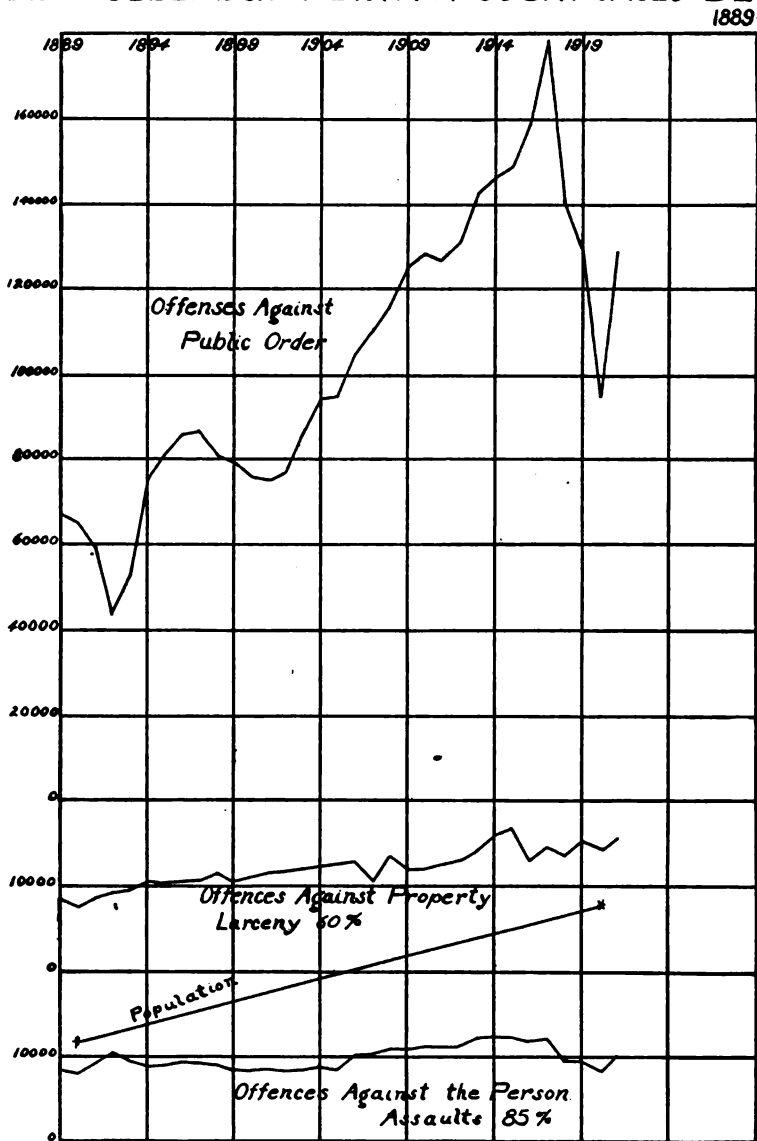
Of what supply, then, are these appealable sentences in the district courts the residue? Chart 3 shows the raw material which comes to the district courts, sub-divided into offences against the person (of which assault forms 85%), offences against property (of which larceny comprises 60%, and its kindred offence of breaking and entering a building and stealing therein, an additional 10%) and offences against public order. A digression may be here permitted to comment on the apparent bearing which the facts here shown have upon the topic of law observance, with the caution that when considered from that angle, allowance must be made for variations in police efficiency and policies dependent in some degree on public opinion. Apparently the chart bears out the rule, it might almost be said the axiom, that as population becomes denser, crimes of violence grow less, and crimes against property increase. In the period covered the former are nearly stationary, though population has nearly doubled, while the latter have gained more, but even

there not as fast as population. When we come to offences against public order, the movement is so wholly different as to call for a further sub-division (chart 4), since it is in this block that the disproportionate gain in court entries has come. The major bulk is in drunkenness, as to which it may be said that the variations in treatment of this offence during the period under consideration have been such that the figures are no safe index of that aspect of criminality.

Before 1891 the fine system prevailed. A thirsty one could, and often did, conceal five dollars in his shoe, and go forth insured against court action the next morning. In 1891 the police were authorized to release without court order, and in 1892 in Suffolk County so released nearly 74% of those arrested for that offence. Court cases, of course, declined, but arrests reached the high peak of 75 per 1000 inhabitants in Boston. The fine system was restored in 1893, affected later by laws as to suspension of fine. The alternate of imprisonment was very largely affected in later years by the growth of probation practice, and by the act of 1905, giving probation officers power to release. In sentencing for this offence, fines have largely given place to term sentences. With all these cross currents, no safe deductions as to criminality can be made.

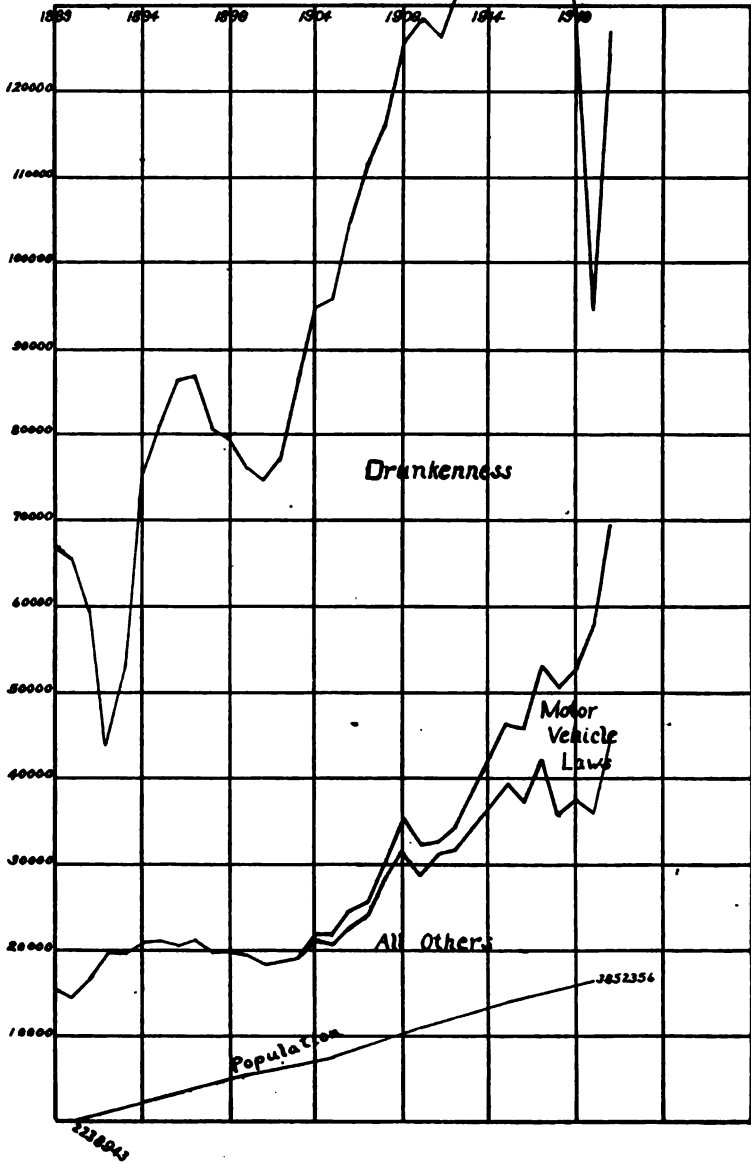
Eliminating that offence, the upward curve becomes more normal. The next largest disturbing element includes violations of the motor vehicle laws, dating from 1903, but now swollen to about a quarter of this group. Akin to these are violations of our state and local traffic laws. Other relatively new gains are in violation of registration laws, health, labor, park and school laws, narcotic drug laws and the laws against carrying of weapons. If all cases in the class of newly created offences could be accurately charted, the remaining cases would show a curve of no more terrifying rise than in the other groups. Again, increase in some classes is due to a more efficient legal machinery. The typical instance is non-support, which gave less than a thousand cases thirty years ago and five times as many now. This does not mean that there is five times as much neglect of family as then, but that the old method which ended the case with a \$20 fine for the use of the wife was less serviceable than the present method of a continuing order of support.

# MASS SUBDIVISION OF DISTRICT COURT CASES BEGUN





# MASS. DISTRICT COURT CASES BEGUN 1889- SUBDIVISION OF OFFENCES AGAINST PUBLIC ORDER.



If our three curves then run below that of population increase, after eliminating all these new offences, many of them only sumptuary laws, is it not time to call for more exact proof from well-meaning but uninformed persons who, dealing only with gross totals or accidental high lights, write books on "lawlessness", and from those who denounce the use of probation and the filing of cases by the courts without troubling to inquire as to the class of cases in which those dispositions occur? In so far as court cases or arrests prove anything as to criminality, the figures indicate that as a whole we are in this state becoming more, not less, observant of law. We seem, in fact, to have survived quite well these supposed impairments of our system of criminal penalties. Indeed, with all our new offences included, and whether we look to the superior or the district courts, it would seem from chart 5 that we are a no more wicked state, having regard to our numbers, than we were three decades or so ago.

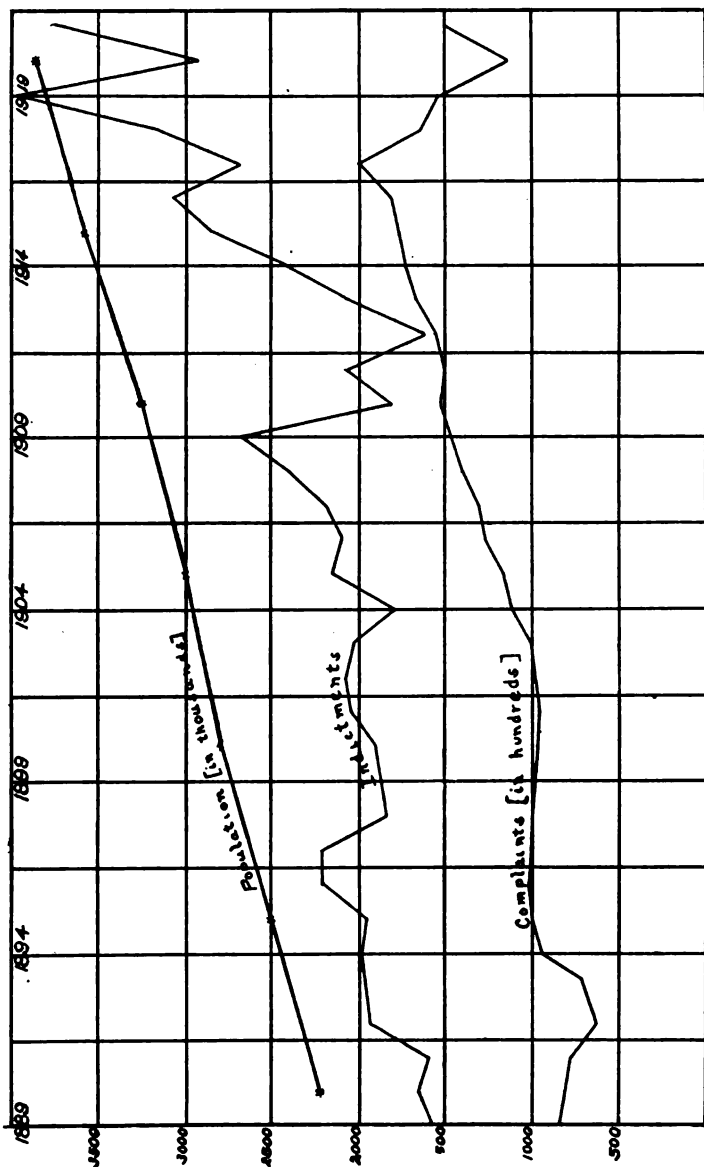
It is probably true that during the last year we have seen a very considerable increase in crime, and that of the graver sort. But it must be remembered that before that time, and for a number of years, we had enjoyed an unprecedented decline in the amount of crime. An upturn was to be expected. We have had such rises before and have survived them. While it behooves us to keep our armor bright, we shall survive this one. It is also interesting to note that the somewhat rapid variations in our "crime curves" bear no apparent relation to any changes in court methods of dealing with offenders, which would produce a long curve because of their gradual adoption. That Massachusetts, where probation was born, and where it has had the most extended development, must still be rated as a law-observing community, would seem to show a want of foundation in fact for the periodic attacks upon the probation system, which has made the largest inroads upon our former notions of punishment.

Returning from this digression for optimism to our subject of criminal appeals, we find in chart 6 the dispositions made of their cases by the district courts. The successive layers represent "drunks" released, at the top, then cases disposed of before trial, then acquittals on trial, then cases

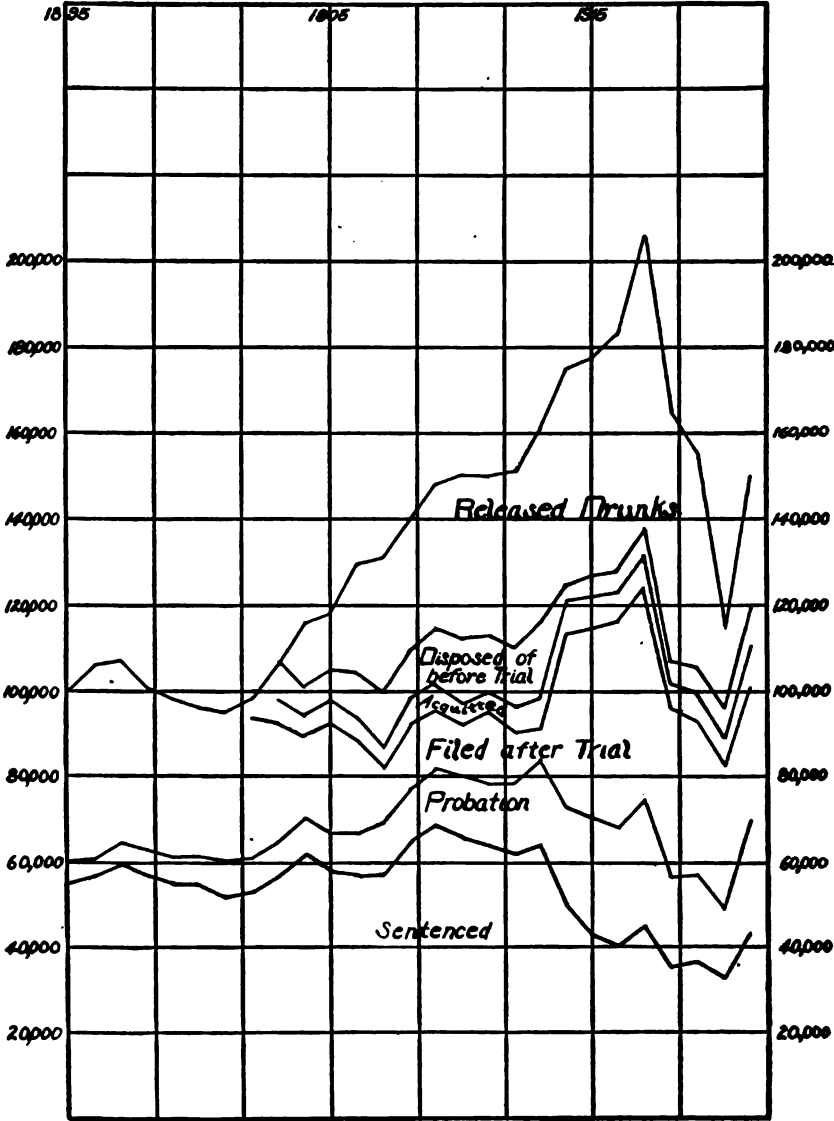
filed after trial, then cases placed on probation, and finally sentenced cases, the last the sole source of appeals. The relatively small number of actual sentences indicates that here, apart from the very small number of reversible convictions, the district courts are at grips with the essentially criminal classes, the great majority of whom have already been tried on probation in the district courts and found wanting, those for whom our penology of today contemplates nothing but punishment.

Chart 7 follows the fate of these appeals in the superior court, since 1914, the first year in which appealed and indicted cases were separated in the statistical tables. The shaded area in the centre shows the number actually retried of these appeals, the part above the central line representing those acquitted on trial—about one in two. The areas above represent cases placed on file before trial, and cases nol-prossed, those below, cases placed on file after trial, cases placed on probation, and sentences. Based on the experience of the years from 1914 to 1920, both inclusive, the chance that one who is charged in a district court with violating the law will be given a sentence there of either fine or imprisonment is one in four, and if he appeals that sentence the chance that he will be sentenced in the superior court is again one in four. In other words, after all the weeding-out which goes on in the district courts before sentence, three-fourths of those there considered fit only for sentence ultimately escape all sentence if they appeal. Unlike the raw material coming to the district courts, that coming to the superior court by appeal is not unwinnowed grain. Of those who do appeal, less than 3% are acquitted on trial by jury, and less than 6% actually are tried. The chart shows a mart of trade, rather than a tribunal for judicial re-trials. Sixty per cent of those who appeal plead guilty in the superior court. It is only of the remaining 40% that we can presume error in the district courts, upon the somewhat violent assumption that all cases nol-prossed ought to be nol-prossed, and that all cases placed on file before trial ought to receive that disposition. After guilt is determined, by plea or trial, more are placed on file than are sentenced, and in addition nearly as many are placed on probation. The dilemma is a plain one. If the sentencing habits of the

# MASS INDICTMENTS AND COMPLAINTS 1889 -



MASS. DISTRICT COURT DISPOSITIONS 1895-



superior court have been right, the district courts have been habitually over-sentencing. If the district courts have been right, the superior court has been habitually under-sentencing. Only public opinion can solve the dilemma.

The data for a qualitative analysis of the disposition of appealed cases are not so extended, the only published report being that of the Commission on the Suffolk Inferior Courts, in 1912. Considering, however, the way in which a given court will repeat its own record year after year, even the brief period there reported is a fairly reliable index. A tabulation of a year's work showed that in Suffolk County, out of a total of 1058 appealed cases in which a fine was imposed in the district court, but 179 received any sentence in the superior court. Of that 179, 98 received the same sentence, 5 received an increased, but 72 a decreased sentence, while four sentences of fine below were changed to imprisonment above. On the other hand, of 1342 imprisonment sentences in the district courts, 853 defendants received no sentence above, and of the remaining 489 sentences, 64 were changed to fine, 28 were increased, but 93 were decreased, and 304 remained unchanged. Alterations in disposition are distributed pretty evenly among the eight district courts of Suffolk County, in proportion to their quota of appeals.

The basic reason in law for allowing an appeal in any case is to meet the constitutional requirement of trial by jury. In so far as an appeal is taken for that purpose, there can be no criticism. But the exceedingly small number of re-trials and the fact that in 60% of appealed cases guilt is admitted, force the conclusion, which accords with the actual experience of all district judges, that in the vast majority of cases the appeal is not to get a jury trial, but to escape a sentence. This is entirely natural, from the standpoint of the culprit, but is it a wise system from the standpoint of the public?

On economic grounds, it seems indefensible, unless one is prepared to urge some reason why a small case, such as simple assault, should engage the successive attention of two courts, but a murder or robbery of but one. Yet the cases in the district court which are inevitably headed for an appeal include the bulk of those which consume the great time and

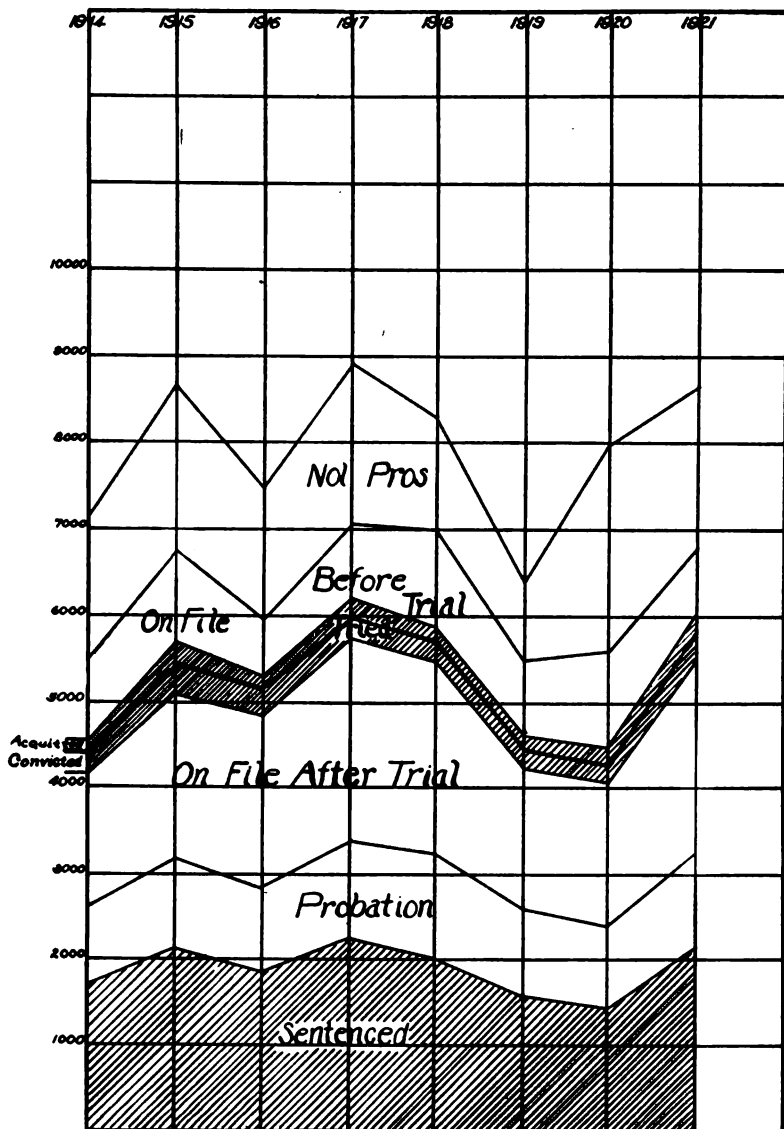
effort of the district courts. They are usually represented by counsel, and the plea is generally "not guilty", that being the more advantageous basis for a trade after appeal. This involves continuances "to prepare for trial" (often a euphemism for collection of a retainer), further attendance of witnesses at public expense, further inroads upon the outside duties of the police, and finally the time of the trial, unless after continuances of varying number the defendant when brought to bay, adopts the growing habit of "admitting a finding". The cost of maintenance of the seventy-odd district courts of the state runs into the millions and at least half of that represents expenditure for time spent in utterly inconsequential effort.

The objections on grounds of policy to the present system are even graver. The district courts, after all is said and done, are our first line of defence against crime. But they instil no fear in the mind of the deliberate criminal. For him, such a court is only one additional hurdle, which the prosecution must clear, or stumble upon to his advantage. If he loses — the words "I appeal" give him a new start. Why then should he fear justice in that quarter, and what respect can he, his friends, or the public have for such an impotent tribunal?

No less important is the effect of the present system upon the district court itself. Is it any more than everyday experience that responsibility breeds care, and that lack of responsibility breeds the opposite of care? We cannot avoid the lesson taught by the change in civil procedure in the municipal court of Boston. Since the old system of appeal after finding in civil cases gave way to the present system of removal for jury trial before trial, there has been infinitely greater care in civil trials. There is incentive to good work now, and the painstaking judge can take pride in good work. There is not much incentive to good work if one knows in advance that a right judgment, rightly reached, is to be undone as soon as rendered, and no reasons given.

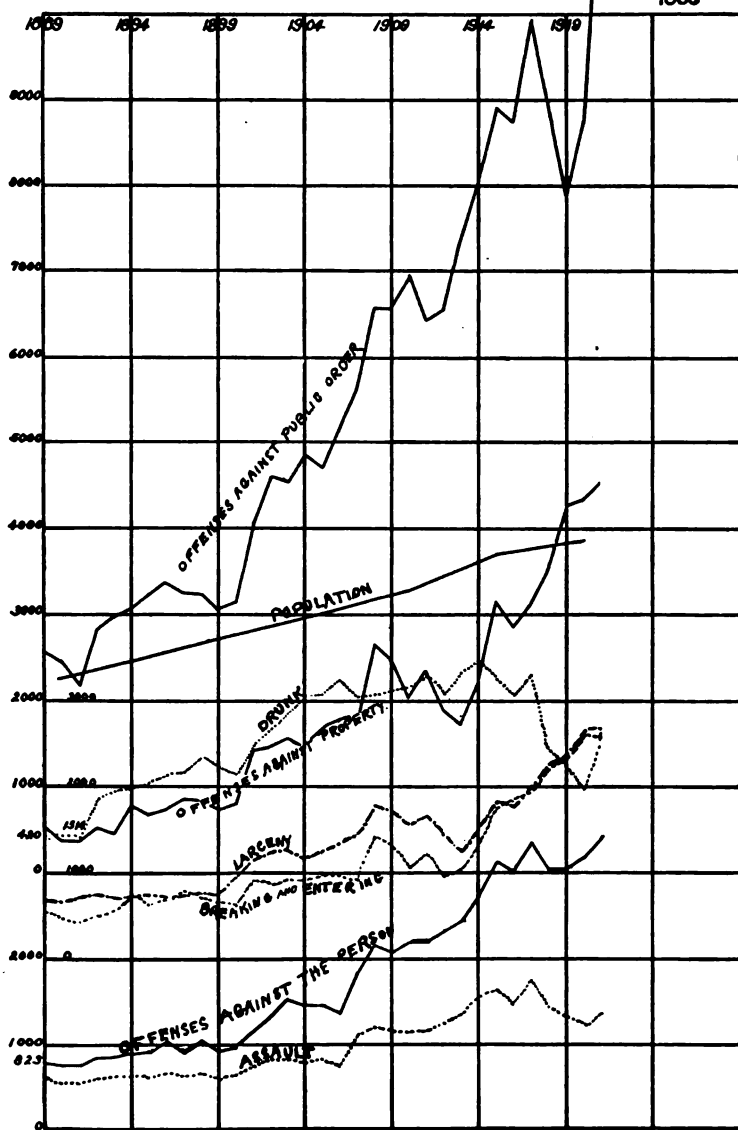
It is well to keep in mind that our system of general appeals is a relic of the justice of the peace system, now practically obsolete. The reasons which led to its adoption are largely non-existent, and the general appeal is fast passing out of our law. So far as it effects a revision of sen-

# MASS. SUPERIOR COURT DISPOSITION OF APPEALS.





# MASS SUPERIOR COURT ENTRIES-BY OFFENSE GROUPS



tence, it is debatable whether it is today the best means to that end. And conceding the fallibility of human justice, no court enjoys a monopoly of freedom therefrom. Yet we have not deemed it necessary, as consistency would dictate, to provide some means of revision of superior court sentences in indictment cases.

It is clearly true that the influx of appeals can be partially stayed by action of the superior court and district attorneys which makes such appeals unprofitable. Hitherto, however, such departures from fixed practice have been spasmodic and short-lived.

It has always seemed to the writer that an improvement upon the present system would be to let the defendant say, upon pleading not guilty, whether he desired trial by jury or not, and if he chose trial by jury, to send him to the jury court without further ado, abolishing the general appeal after sentence. It is true that this may involve some pains in explaining his rights to an ignorant defendant, but it takes no greater intelligence to comprehend an offered choice before trial between jury and non-jury trial, than to comprehend the right of appeal after conviction. Neither one is as complicated as the daily offer of a non-appealable suspended sentence.

No one can pretend to foretell with certainty how such a change would operate to distribute the work between the district and superior courts. Much would depend on the relative severity of sentences. But again the experience with election before trial in civil suits is worth remembering. Before the change from the appeal system, 10% of all entries in the Boston municipal court, 40% of all its findings, were appealed. It was predicted that all cases would flock to the superior court after the change. But year in and year out, since the change was made in 1912, the percentage of removals to the superior court for jury trial has remained constant at 3% of entries. That liberty rather than money may be at stake in criminal cases might result in a larger percentage of removals than in civil cases, but there is still a respectable margin of safety.

It is probable, however, that the suggested change would operate much to the relief of the superior court. It appears from chart 8, that the great numerical gain in criminal en-

tries in that court has come from the group of offences against public order. But it is in the two other classes that indictment cases almost invariably fall. In that of offences against the person are classed murder and manslaughter, felonious assaults, rape, robbery and conspiracy. In that of offences against property, in addition to larcenies, are arson, breaking and entering, and burglary. But offences against public order come almost wholly from the district courts. Very many of those offences admit only of a fine. In many more, where an alternative sentence is permissible, practice holds largely to fine. The probability of an initial choice of removal in the great bulk of these cases is relatively small. The large classes in this group are drunkenness, vagrancy, offences against chastity, non-support, violation of liquor laws, gaming, violation of motor vehicle and traffic laws, and of city ordinances. Call for a jury trial in such cases should be rare. Revision of sentence is not for these an urgent necessity. Yet the total number of appeals bulks large enough to clog the superior court, hindering more important cases. As long as the system allows the double chance, convicted defendants will use it. It seems better to change the system than indulge in periodical house-cleanings, such as that now going on. At bottom the present practice as to such cases rests on the proposition that revision of open judicial action in district courts can satisfactorily and safely be left to assistant district attorneys.

The possible necessity of readjustments to meet unexpected proportions in the district and superior courts is a small item as against the relief which must come somewhere as a result of the single instead of the double hearing. So far as the superior court is concerned, it gets the cases now which at the worst it would get under the plan suggested, and we saw at the outset that it is getting them in increasing volume. If the relief comes in the district courts, there is one at least in which it will be welcome, for in the three criminal sessions of the Boston municipal court are crowded 24% of all the cases in the 73 district courts of the state, and while no fair comparison can be based on mere numbers, it is of interest to note that the municipal court has of "cases tried" six times the number of criminal trials in the superior court for the state, more than half of which superior

court trials are of appealed cases. When to the tendency towards careless work arising from known infinality is added the result of haste from over-pressure, expansion cannot go on indefinitely with safety.

Apart from the saving in cost, and the release from wasted time and effort, the plan advocated could not fail to result in more speedy justice, certainly desirable whether the outcome be acquittal or punishment.

The suggested change in method carries two requirements, certainly a device to correct error of law and perhaps one to equalize sentences. The first is at hand so far as the Boston court is concerned, in its appellate division, and it has this advantage, that the closer you can bring the means of correction to the erring judge, the smaller the danger of repetition of the error. Correction under the system of general appeal to the superior court almost never filters back. The same is true of sentences. Summary and speedy revision of a sentence by three justices of the same court is infinitely more effective than delayed revision by one judge of another tribunal. No one has ever yet proved that there is any great uniformity in the sentences of the superior court.

The situation is more difficult in the other district courts of the state, and that is why the Judicature Commission recommended an experimental try-out of the change in the Boston court. The difficulty arises from the isolation of these courts, something which the judges themselves fully recognize, and from which they have vainly sought relief. The judge is rare who persistently and knowingly sets his opinion against that of all the rest of his fellows. Extremes of practice and disposition arise generally from lack of knowledge that one is an extremist. What is needed is some clearing house which shall examine the returns, allocate the extremes of variation and report them back—a very fit labor for a judicial council, for unequal justice makes for disrespect for law in a major degree.

It may be that until some better means of cohesion and inter-communication of the district courts outside of the Boston courts are found, the superior court will furnish there the only avenue of relief for error of law or, if deemed necessary, for impropriety of sentence. Even so, we can limit the review to the error and that is no small gain over a

general appeal which vacates all, right or wrong, and the right as well as the wrong.

Action of some sort is needed. Almost without exception district attorneys are calling for relief from the rising tide of cases in the superior court. The indications are that district courts, more or less consciously, are reacting to the situation by accepting the traditional half loaf, reducing public security thereby. Better some steps that have to be retraced than to await complete breakdown. And the opinion is ventured that the chief opposition to the change advocated will come from the beneficiaries of the present system. The main urge to an appeal today is not so much a sense of injustice suffered as the existence of another and better chance ahead. But, again, why two chances in small cases, one in large?

## THE DISTRICT COURTS OF MASSACHUSETTS.

*(Extract from an address of Hon. Henry T. Lummus of the superior court, before the Essex County Bar Association, June, 1922.)*

For years we have heard that the district courts are most important, that they can be the strength or the weakness of our judicial system, and that in them many thousands of our people, particularly the foreign born, gain their only view of the justice and judicial power of the Commonwealth.

All this is true; and if the people find that justice unequal or uneven, or that power weak and liable to be halted and rendered impotent at the will of any litigant, many of them will infer that the laws of the Commonwealth are not entitled to obedience or respect.

Yet for many years we have been proceeding in Massachusetts, as though all this had no practical importance and required no action.

During all the time that we have heard the importance of the district courts discussed, we have heard much about their infirmities. Some complaints have been only the natural result of the presence on the bench, day after day, of the same man; of the tendency of human nature to condemn a judge when he decides against us while declaring that he did only what he was compelled to do when he decides in our favor; and of the inability of any judge to gratify in criminal cases the curiously contradictory popular desires for mercy, on the one hand, and for rigorous enforcement of the law—where one's own family or friends are not involved—on the other. But there has been some basis for some of the complaints.

Most of the faults of our district courts can be traced to two things—first, their want of power and responsibility, and, second, their isolation from each other.

Few men, whether lawyers or laymen, will respect a court that has no power. Contempt for weakness is deeply ingrained in human nature. How often do lawyers tell ignorant foreign clients that the decision of the district court is of

no consequence and entitled to no respect! What do you suppose is the effect of such thoughtless words upon the minds of such clients?

It is hard for a court without real power to respect itself. What good woodsman could remain such long, if set to pounding on a tree with the head of the axe? What sculptor could do good work if any passerby should be entitled by law to throw the statue into the harbor? Power and responsibility breed caution, judgment, sanity and efficiency; the want of power and responsibility produces the opposite effects.

The district courts are now the sole heirs of an absurd system of double trials of questions of fact, once so universal in Massachusetts that the losing party in a jury trial presided over by the full bench of the Supreme Judicial Court was entitled by law to a new trial by another jury before the same court.

A vicious circle has been created, by which incompetent men have been deemed worthy of district court judgeships because they carry little power, and then district courts have been denied more power because of the incompetence of some of the judges;—a kind of reasoning which, if maintained, would forever prevent reform.

A judge of a district court finds his decisions swept aside without reason, but he can never be convicted of legal error. He lacks responsibility as well as power.

In view of the degenerating force of the appeal system upon our district judges, the wonder is that, working under that system, so many of them have maintained such a high standard of public service.

The second evil to be noticed in the district court system is the isolation of the courts from each other.

A judge sitting in one place, without opportunity to observe what more able and progressive judges are doing, is likely to adopt parochial practices, often inherited from his predecessors—such as the mechanical sentencing of drunkards according to a schedule based upon the number of offences within the year, without regard to industry, manner of life or periods of sobriety. In my opinion a sentence of imprisonment for drunkenness, whether suspended or not, should never exceed seven, ten, fifteen, or, at the utmost,

twenty days, except in the case of a defendant who is habitually drunken, idle or disorderly and is fit for the State Farm, or for extended hospital treatment. Another unwise practice is the crusading against some particular kind of offenders, like violators of the liquor law, by means of jail sentences for first offences, invariably appealed and impossible to sustain in the superior court without congesting the list so that no other business can be done. Everybody knows—including the judge taking such action—that a district court so acting is not doing its work as a part of our judicial system, but is merely unloading its work upon the superior court with a virtuous but meaningless gesture of enforcement of the law. Any notion that such action strikes terror into the hearts of wrongdoers, is a delusion; it only brings our criminal justice into disrepute.

A local judge who does not take pains to learn the best practices in other courts, may unconsciously begin to look for advice and interchange of ideas to his clerk, or the chief of police, or some local reformers, all of whom he ought to keep at arm's length so far as the disposition of cases is concerned. The loss of judicial independence is easy; the consequences are deplorable.

There is reason to believe that many of the evils of our district court system will be remedied by the act recently approved by His Excellency the Governor (St. 1922 c. 532), which abolishes civil appeals from district courts, establishes appellate divisions for the review of questions of law in civil cases, and creates an administrative committee of judges to improve and make more uniform the practices and methods of the various courts. I believe that this act marks the beginning of a period of new usefulness, dignity and vigor for our district courts.

The act makes no change in the law as to criminal cases, in which the district courts are especially important. They form the main line of defence of the community against criminals; the superior court is no adequate substitute for them.

The system of criminal appeals was designed for a small, homogeneous population, largely rural, with a simple civilization, and only the elementary common law crimes. It is



not too much to say that it has broken down under the strain imposed upon it by our large, mixed urban population, and our numerous and varied crimes.

At no distant day criminal appeals will have to be abolished, and a system substituted by which a defendant submitting to trial in a district court must abide by the decision, subject to the correction of errors of law and to the summary revision of sentences thought to be excessive.

In the meantime our task is to do what we can with the present obsolete machinery.

The appeal in criminal cases, instead of being, as originally intended, a mode of review of findings and sentences honestly believed to be wrong, has been converted into a means of clogging the docket of the superior court with cases awaiting jury trial in the brief sittings provided, until in sheer desperation district attorneys and judges have sometimes disposed of cases upon terms dictated by criminal defendants.

Through weak submission to such dictation, several indefensible notions have sprung up. One is, that a defendant is entitled to know the ultimate disposition of his case before he pleads guilty—that the sovereign state should permit him to impose conditions as to its judicial action. Another is, that the court is bound to abdicate its duty to determine the sentence, whenever the district attorney and the defendant are agreed. A third notion is, that the real question to be decided on appeal is the amount of deduction from the district court sentence, the defendant holding a virtual policy of insurance against the imposition of any greater penalty; the district court sentence, though annulled for every other purpose, is deemed sacred as fixing the maximum.

If any greater penalty is imposed on appeal, the cry is raised that a defendant should not be penalized for exercising his right—usually misdescribed as a constitutional right—of appeal. If that cry meant that a defendant, no matter how or why he delays conviction and sentence, should not be given more than a reasonable sentence for his crime, it would suggest a sound doctrine.

But that is not the meaning intended. The proposition implied in that cry is, that there should be no difference in penalty between one man who confessed his guilt, possibly

expressed his contrition, and accepted his penalty in the district court, and another man—guilty as he must be deemed to be else he would not be before the superior court for sentence—who has fought and delayed to the bitter end, and has cost the public valuable time and hundreds of dollars before justice could overtake him.

Such a proposition seems self-evidently absurd. It runs contrary to the customs of the profession for generations. The right of appeal is surely no more sacred than the right of an indicted defendant to be tried by a jury; yet from time immemorial defendants who turn state's evidence, or plead guilty when arraigned, have claimed and received more clemency than those who fight to the last ditch. Everyone knows that criminal sittings cannot be run, in practice, on any other theory. Recently in a criminal sitting of fifteen court days I found four hundred cases, most of them arising on appeal, on the list for jury trial. Possibly there was time to try thirty cases—not more. Ninety per cent of criminal defendants in the superior court, if not more, are unquestionably guilty. So long as every defendant, even in the smallest case, has a constitutional right to trial by jury, there are only two ways of disposing of any considerable volume of criminal business—a tremendous enlargement of judicial and legal machinery, or some means of inducing the great mass of criminal defendants, in fact guilty, to waive their technical rights and to plead guilty. Practically, unless defendants are prevented from gaining any assurance that their cases will not be reached for trial during the sitting, and the court, without descending to trading with defendants, nevertheless brings home to them the advantage of pleading guilty instead of being found guilty, the court and the public who maintain it will inevitably be swamped by ever-increasing arrearages of untried cases. If those who plead guilty after appeal are entitled to special clemency, how much more are those who surrender in the district courts, and never come before the superior court at all! It would be amusing, were it not serious, to hear the extremely practical defendants and their attorneys, who have so long abused and prostituted the right of appeal, attempt to forestall the only remedy now available by invoking a refined but specious abstract theory.

The short answer to the cry just discussed is, that for every particular criminal case there is a belt or stratum of possible penalties on conviction, within which no sentence can be called unreasonable. A guilty defendant who causes the public much effort and expense to convict him cannot complain if he finds his sentence proportionately close to the upper limits of what is reasonable.

For years the district courts, generally speaking, have been the tribunals in which are imposed striking though ineffective sentences, in the hope of intimidating criminals; while the superior court has been the tribunal in which, partly from a desire to show mercy and to commit no excess, and partly from the necessity of getting through its business, those sentences have been cut down.

To my mind, these functions should be pretty nearly reversed. Both the superior court and the district courts should act as parts of an integrated system, with a clear view of the practical possibilities open to them and of the practical consequences of their action. The district courts should strive by the exercise of leniency wherever possible, by temperance and moderation in sentences, by the discreet use of reasonable suspended sentences of imprisonment and by liberality in giving time for the payment of fines, to make final disposition of criminal cases brought before them and to give no man any reasonable cause to appeal. The superior court should remember that it sees on appeal only the residuum of a vast amount of criminal business, most of which is dealt with leniently in the district courts, and that undue leniency in the superior court invites unjustified appeals.

In so far as the district courts adopt the policy just advocated, of giving no reasonable justification for appeal, I think the normal and wholly logical result of conviction on appeal should be the increase, rather than the reduction or mere affirmance, of the sentence below. The administration of justice is a practical problem, the cost of criminal appeals falls heavily upon the law-abiding citizen, and there is no reason why guilty defendants should play the game without risk.

## USING EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE

SINCE ADOPTION OF CONSTITUTIONAL PROHIBITION THE FOURTH AMENDMENT HAS SUDDENLY COME INTO WIDE AND FREQUENT RELATION TO LAW ENFORCEMENT—CONSIDERATION OF ITS RECENT DEVELOPMENTS.

By JOHN H. WIGMORE

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Until recent years, the usual classes of persons who have occasion to invoke the Fourth Amendment to the Federal Constitution, in order to obstruct proof of their guilt, seem to have been forgers, panders, gunmen, get-rich-quick schemers, fraudulent bankrupts, and the like; and they are, of course, limited in number. But since the date of the Eighteenth Amendment and its enforcement, a potential field of vast extent has been added; for the proof of almost all varieties of offense against the liquor laws involves production of the liquor itself, and the liquor is usually and naturally found by search and taken in *flagrante delicto*. Hence, the Fourth Amendment in its bearing on proof of crime has now suddenly come into wide and frequent relation to law enforcement, and is of interest to a wider circle, including many not ordinarily deemed "undesirable citizens." A consideration of its recent developments will be timely.

A. *Documents, Chattels, Testimony, obtained by Illegal Search or Removal; General Principle.* Necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods. An employer may perhaps suitably interrupt the course of his business to deliver a homily to his office-boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the

primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law. It offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the next place, by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it. It offends, further, in that it does this unnecessarily and gratuitously; for since the persons injured by the supposed offense have not chosen to seek redress or punishment directly and immediately, at the right time and by the proper process, there is clearly no call to attend to their complaints in this indirect and tardy manner. The judicial rules of Evidence were never meant to be an indirect process of punishment. It is not only anomalous to distort them to that end, but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored.

For these reasons, it has long been established that the *admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.* (Footnote 1.)

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<sup>1</sup>An extended footnote cites apparently all the English, Canadian and American State Court decisions on the subject, including those in which the view of the court has changed. Massachusetts cases are cited as follows:

*Massachusetts*: 1838, *Faunce v. Gray*, 21 Pick. 243, 246 (deposition of defendant, taken "in perpetuum," admitted, regardless whether it has been "unfairly obtained" by a "perversion and abuse" of the statutory process); 1841, *Com. v. Dana*, 2 Metc. 329 (quoted *supra*); 1850, *Com. v. Certain Lottery Tickets*, 5 Cush. 369, 374 (approving *Com. v. Dana*); 1862, *Com. v. Certain Intox. Liquors*, 4 All. 593, 600 (officer's misconduct in executing process does not exclude his testimony based on knowledge thus obtained); 1872, *Com. v. Welsh*, 110 Mass. 359 (similar); 1882, *Com. v. Taylor*, 132 id. 261 (similar, for a medical officer making an unauthorized autopsy); 1885, *Com. v. Henderson*, 140 id. 303, 5 N. E. 832 (like *Com. v. Welsh*); 1889, *Com. v. Keenan*, 148 id. 470, 472, 20 N. E. 101 (similar); 1892, *Com. v. Ryan*, 157 id. 403, 405, 32 N. E. 349 (ballots admitted, irrespective of the process of obtaining them); 1893, *Com. v. Tibbetts*, ib. 519, 521, 32 N. E. 910 (letters obtained by search under warrant for search of husband's premises for liquor); 1893, *Com. v. Hurley*, 158 id. 159, 33 N. E. 342 (police officers unlawfully arresting, allowed to testify to what they found); 1893, *Com. v. Byrnes*, ib. 172, 174, 33 N. E. 343 (butter-sample, admitted, irrespective of the legality of obtaining it); 1894, *Com. v. Brelsford*, 161 id. 61, 36 N. E. 677 (like *Com. v. Welsh*); 1895, *Com. v. Welch*, 163 id. 373, 40 N. E. 103 (unlawful search of the person for liquor); 1895, *Com. v. Acton*, 165 id. 11, 42 N. E. 329 (illegal search for liquor by officers); 1896, *Com. v. Smith*, 166 id. 370, 44 N. E. 503 (unlawfully seizing gaming implements); 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (officers obtaining a knife, by a trespass and search of the defendant's house; admitted).

1841, *WILDE, J.*, in *Com. v. Dana*, 2 Metc. 329: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice how they were obtained, —whether lawfully or unlawfully,—nor would they form a collateral issue to determine that question."

1875, *SCHOFIELD, J.*, in *Stevison v. Earnest*, 80 Ill. 513, 518: "It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Suppose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If he could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?"

1897, *LUMPKIN, P. J.*, in *Williams v. State*, 100 Ga. 511, 28 S. E. 624: "As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitutions of the United States and of this and other States merely sought to provide against any attempt, by legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of this constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the Courts to denounce as unlawful every unreasonable search and seizure, whether confessedly without any color of authority, or sought to be justified under the guise of legislative sanction. For the misconduct of private persons, acting upon their individual responsibility, and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed,

he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct. . . . Whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination."

B. *Modern Federal Doctrine of Boyd v. U. S. and Weeks v. U. S.* The foregoing doctrine was never doubted until the appearance of the ill-starred majority opinion of *Boyd v. United States*, in 1885, which has exercised unhealthy influence upon subsequent judicial opinion in many states. That opinion, thoroughly incorrect in its historical assertions, and traveling outside the question at issue, advanced two fallacious conclusions, viz.: first, that the Fourth Amendment to the Constitution (prohibiting unreasonable search and seizure) was so related to the Fifth Amendment (prohibiting compulsory self-incrimination) that the Fifth Amendment could be invoked by an accused to withhold from surrender documents sought by even a *lawful* official search; and secondly, that documents obtained by *unlawful* official search could be excluded from evidence, as a consequence of the Fourth Amendment.

The first of these fallacies was soon afterwards fully repudiated in the court of origin; the subject is too large to be here further considered.

The second fallacy is of course in direct contradiction to the fundamental principle here under consideration; and remains to be noticed.

1. The progress of this doctrine of *Boyd v. United States* was as follows: (2) (a) The *Boyd Case* remained unquestioned in its own Court for twenty years; meantime receiving frequent disfavor in the State Courts (*ante*, §2183). (b) Then in *Adams v. New York*, in 1904, it was virtually *repudiated* in the Federal Supreme Court, and the orthodox precedents recorded in the State Courts (cited above) were expressly approved. (c) Next, after another twenty years,

in 1914—this time moved, not by erroneous history, but by misplaced sentimentality—the Federal Supreme Court, in *Weeks v. United States*, *reverted to the original doctrine* of the *Boyd Case*, but *with a condition*, viz., that the illegality of the search and seizure should first have been directly litigated and established by a motion, made before trial, for the return of the things seized; so that, after such a motion, and then only, the illegality would be noticed in the main trial and the evidence thus obtained would be excluded. (d) Subsequent rulings attempted to work out this doctrine consistently. (Footnote 2.)

Meanwhile, the heretical influence of *Weeks v. United States* spread, and evoked a contagion of sentimentality in some of the State Courts, inducing them to break loose from long-settled fundamentals.

In this last period, much of the effect may be ascribed to the temporary recrudescence of individualistic sentimentality for freedom of speech and conscience, stimulated by the stern repressive war-measures against treason, disloyalty and anarchy, in the years 1917-1919. In a certain type of mind, it was impossible to realize the vital necessity of temporarily subordinating the exercise of ordinary civic freedom during a bloody struggle for national safety and existence. In resistance to these war-measures, it was natural for the misguided pacifistic or semi-pro-German interests to invoke the protection of the Fourth Amendment. Thus invoked and made prominent, all its ancient prestige was revived and sentimentally misapplied. In such a situation, the forces of criminality, fraud, anarchy, and law-evasion perceived the advantage and made vigorous use of it. Since the enactment of the Eighteenth Amendment and its auxiliary legislation, a new and popular occasion has been afforded for the misplaced invocation of this principle; and the judicial excesses of many Courts in sanctioning its use give an impression of maudlin complaisance which would be ludicrous if it were not so dangerous to the general respect for law and order in the community.

No doubt a stage of saturation must be reached before this period of misuse of the Fourth Amendment will come to a close.

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<sup>2</sup>An extended footnote cites the Federal cases covering all the periods mentioned in the text.



2. As to the *legal theory* of *Weeks v. United States*, there seems to be little support for it,—assuming at least the fundamental principle of par. A, above is accepted.

(a) The opinion in *Weeks v. United States* seeks to distinguish the above established principle as merely requiring “that a *collateral issue* will not be raised to ascertain the source from which testimony competent in a criminal case comes,” while in the *Weeks* case the defendant made a formal motion before trial for the return of the seized documents. But this is an unsound use of the term “collateral”. That term signifies “not relating to the main issue”, and is applied to a class of facts. Now a defendant cannot turn a collateral fact into a material fact by merely making a formal motion before trial, instead of waiting till the offer of evidence. Suppose, in this lottery charge, he has made a motion that (say) the results of the last municipal lottery in Naples be sent for, to be laid before the Jury; that would not turn the obviously collateral fact into a material fact. The point is that the fact of illegality of method in obtaining evidential materials is a collateral fact to the main issue; and all the motions in the world will not make it anything else.

(b) Looking still deeper, the mainstay of the special doctrine of *Weeks v. United States* is that the party whose documents were obtained by illegal search *has a right to obtain their return* by motion before trial. But no such consequence is implied in the Fourth Amendment. The object of the amendment was to protect the citizen from domestic disturbance by the disorderly intrusion of irresponsible administrative officials. It expressly forbids such official misconduct, and it implies both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials. But it implies nothing at all as to the nature of the documents or chattels possessed by the citizen, and they may be treasonable, criminal, wicked, harmless, or meritorious, so far as the Amendment’s tenor is concerned. And when the citizen sets up a right to a remedial process for their return, certainly the merits of the articles themselves must come into issue. If the officials, illegally searching, came across an infernal machine, planned for the city’s destruction, and impounded it, shall we say that the diabolical owner of it may appear in court, brazenly demand process for its return, and be supinely

accorded by the Court a writ of restitution, with perhaps an apology for the "outrage"? Such is the logical consequence of the doctrine of *Weeks v. U. S.*, unless the right to return be dependent on the merits of the document or chattel as being instruments of crime or not. Yet no such issue is permitted by the doctrine of *Weeks v. United States*.—The truth is that the doctrine in question is illogical, and that the citizen has no right to claim a return of the articles taken unless their criminal or innocent nature be first determined; but as that is part of the very issue in the main charge, it cannot be determined in advance; so that the doctrine leads to impracticable results.

3. But the essential fallacy of *Weeks v. United States* and its successors is that it virtually creates a novel exception, where the Fourth Amendment is involved, to the fundamental principle (*ante*, §2183) that *an illegality in the mode of procuring evidence is no ground for excluding it*. The doctrine of such an exception rests on a reverence for the Fourth Amendment so deep and cogent that its violation will be taken notice of, at any cost of other justice, and even in the most indirect way.

The following opinion contains the most that can be said from this point of view:

1920, CARROLL, C. J., in *Gorman v. Com.*,—Ky.,—224 S. W. 860: "It stands admitted that the evidence offered on the trial, and to the introduction of which objection was then made, was obtained in an unlawful way by a county officer charged with the duty of giving complete obedience to the Constitution and laws of the State. This officer, in violation of the Constitution and in disregard of the statute pointing out the way in which premises might be searched, took the law into his own hands, invaded the premises of and went into the buildings of the suspected offender, and without asking or obtaining his consent proceeded to and did search for and find the liquor that was seized. On these facts the question presented is: Will courts, established to administer justice and enforce the laws of the State receive, over the objection of the accused, evidence offered by the prosecution that was admittedly obtained by a public officer in deliberate disregard of law for the purpose of securing the conviction of an alleged offender? In other words, will Courts authorize and encourage public officers to violate the law, and close their eyes to methods that must inevitably, bring the law into disrepute, in order

that an accused may be found guilty? Will a high Court of the State say in effect to one of its officers that the Constitution of the State prohibits a search of the premises of a person without a search warrant, but if you can obtain evidence against the accused by so doing you may go to his premises, break open the doors of his house, and search it in his absence, or over his protest, if present, and this Court will permit the evidence so secured to go to the jury to secure his conviction?

"It seems to us that a practice like this would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that Courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice like this. It is much better that a guilty individual should escape punishment than that a Court of justice should put aside a vital fundamental principle of the law in order to secure his conviction. In the exercise of their great powers, Courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified. It is trifling with the importance of the question to say, as some courts have said that the injured party has his cause of action against the officer, and this should be sufficient satisfaction. Perhaps, so far as the rights of the individual are concerned, this might answer; but it does not meet the demands of the law-abiding public, who are more interested in the preservation of fundamental principles than they are in the punishment of some petty offender."

All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, a Court appears indifferent to what is the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer.

Among the best judicial expositions of the orthodox view, the following stands out:

1922, *BAKER, J.*, in *U. S. v. Snyder*, D. C. W. D. W. Va., 278 Fed. 650 (the accused had been arrested without a warrant, on sight of bulging pockets as he stood on the street corner, and liquor was found in his pockets): "The Fourth Amendment to the Constitution contains no prohibition against arrest, search, or seizure without a warrant. That was left under the rules of common law. The amendment provides not that no arrest, search, or seizure should be made without a warrant, but prescribes that there shall be no *unreasonable* search and seizure; in other words, that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; not against all searches and seizures, but simply against *unreasonable* searches and seizures. And this brings us to the question: In what cases may arrests, searches, and seizures be made without a warrant, under the principles of the common law and statutory law prevailing in this country? . . . It can be said to be the Common law of the states, or the common law of the great majority of the states, in the Union, that a peace officer, a prohibition officer, has the right to arrest a criminal offender caught in the act of committing the crime; and when he arrests him, if he captures him with counterfeit coin, if he catches him with smuggled goods, if he catches him with stolen articles, if he catches him with liquor under the Prohibition Law, he has the right not only to arrest him without a warrant, but to search him and to retain the wet goods as evidence against him. . . . To hold that no criminal can in any case be arrested and searched for the evidence and tokens of his crime without a warrant, would be to leave society, to a large extent, at the mercy of the shrewdest, the most expert, and the most depraved of criminals, facilitating their escape in many instances."

1922, *SLOANE, J.*, in *People v. Mayer*,—Cal.—, 205 Pac. 435 (articles found under an invalid search-warrant on a charge of larceny had erroneously denied to be returned and were afterwards used in evidence):

"Without at all minimizing the gravity of such offense, or the sacredness of the right of every citizen to secure in his person, home, and property from any unlawful invasion by the state, it does not follow that the subsequent detention and introduction in evidence of the property thus wrongfully taken constituted error on the trial of the appellant. The trespass committed in the wrongful seizure of these personal effects by unauthorized officers, and the subsequent use of the same in evidence on the part of the prosecution, were in legal effect entirely distinct transactions with no necessary or inherent relation to each other. . . . No authority, so far as we have been able to discover, has suggested that the subse-

quent use of articles so taken as evidence is in itself any part of the unlawful invasion of such constitutional guaranty. The search and seizure are complete when the goods are taken and removed from the premises. Whether the trespasser converts them to his own use, destroys them, or uses them as evidence, or voluntarily returns them to the possession of the owner, he has already completed the offense against the Constitution when he makes the search and seizure, and it is this invasion of the rights of privacy and the sacredness of a man's domicile with which the Constitution is concerned. . . .

"Upon what theory can it be held that such proceeding [for the return of the articles] is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the State or its agents. . . . The fallacy of the doctrine contended for by appellant is in assuming that the constitutional rights of the defendant are violated by using his private papers as evidence against him, whereas it was the invasion of his premises and the taking of his goods that constituted the offense irrespective of what was taken or what use was made of it; and the law having declared that the articles taken are competent and admissible evidence, notwithstanding the unlawful search and seizure, how can the circumstance that the court erred in an independent proceeding for the return of the property on defendant's demand add anything to or detract from the violation of defendant's constitutional rights in the unlawful search and seizure?

"The Constitution and the laws of the land are not solicitous to aid persons charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transomlight. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment. Thus it is that almost from time immemorial courts engaged in the trial of a criminal prosecution have accepted competent and relevant evidence without question, and have refused to collaterally investigate the source or manner of its procurement, leaving

the parties aggrieved to whatever direct remedies the law provides to punish the trespasser, or recover the possession of goods wrongfully taken."

The doctrine of *Weeks v. United States* also exemplifies a trait of our Anglo-American judiciary peculiar to the mechanical and unnatural type of justice. The natural way to do justice here would be to enforce the splendid and healthy principle of the Fourth Amendment directly, *i. e.*, by sending for the high-handed, over-zealous marshal who had searched without a warrant, imposing a thirty-day imprisonment for his contempt of the Constitution, and then proceeding to affirm the sentence of the convicted criminal. But the proposed indirect and unnatural method is as follows:

"Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let *both* go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."

Some day, no doubt, we shall emerge from this quaint method of enforcing the law. At present, we see it in many quarters. It will be abandoned only as the judiciary rises into a more appropriate conception of its powers, and a less mechanical idea of justice.

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#### *Note*

In the February number of this magazine, the report of the Committee on Law and Procedure of the Association of Justices of the District Courts was reprinted, containing a discussion of the subject of search and seizure from a different point of view.

There is some dramatic history in connection with the constitutional provisions about search and seizure which has a distinctly humorous as well as a serious aspect. The tenth

article of the Virginia Bill of Rights of 1776, the fourteenth article of the Massachusetts Bill of Rights, and the fourth amendment to the Federal Constitution were popular expressions of protest against the enforcement of laws which were commonly regarded as arbitrary and unreasonable, in other words, they grew out of the common opinion in colonial America that "smuggling" in violation of the unreasonable and obnoxious British trade restrictions was not only an adventurous and patriotic sport and a lucrative occupation, but almost an inalienable right. This view was strong in New England and, of course, the attention of the colonists was focussed on the whole matter by the dramatic argument of James Otis against the Writs of Assistance in the Old State House in Boston in 1761.

The story leading up to the application for the writs is told by Professor Channing as follows:

"Acts of Parliament restraining colonial navigation and taxing the colonies of the continent for the benefit of the West Indian sugar planters had been on the statute book for years. The Northerners had observed whatever of them they liked and had attended little to the rest, except now and then to bribe an inquisitive governor or an overcurious customs collector. In 1760 William Pitt, finding that the continental colonists were trading with the French and Spanish Islands in the West Indies, cast about for the best means to put a stop to this traffic with the enemy. His advisers told him that if the Sugar Act of 1733 were enforced, this trade must come to an end. This was true because this law provided a prohibitive duty of sixpence per gallon on all molasses brought into the northern colonies, except that which came from British plantations. To enforce the act would deprive the French and Spanish planters of the means of paying for lumber, fish, and flour which they needed for their slaves and for themselves. Thereupon, Pitt ordered the provisions of the act to be enforced to the letter.

"The Sugar Act had never been executed for two reasons. In the first place, as soon as it was passed the British sugar planters discovered that what they really wanted was the right to export sugar directly from the islands

to continental Europe. Obtaining this favor, they no longer needed the northern American market. In the second place, in the existing conditions of trade, an adequate supply of molasses for distillation into rum was absolutely necessary for the prosperity of New England and the Middle Colonies. Rum was the currency used in the African trade and in the fur trade, and enormous quantities of it were consumed at home and in other English colonies. Not one quarter enough molasses was produced in the English islands to satisfy the needs of the northern distillers—they must have foreign molasses or go out of business. In the absence of any efficient customs service it was not difficult to evade this law or any other. A false clearance might be obtained at Anguilla, or some other British island, or collectors, governors, and judges might be bribed by the payment of a small percentage of duty that should have been levied under the act. Even when the officials wished to collect the duty, they found it very difficult to do so where the whole population was against them. Ordinary search warrants were of little use because these were issued only upon information and applied only to certain specified goods in specified places. A writ of assistance was more efficacious because it enabled the holder to search any house or ship, to break down doors, open trunks and boxes, and seize goods at will. In case of opposition, he might call upon the civil authorities for aid. These general writs had been used in England a long time, and a few of them had been issued in the colonies. The announcement that the Sugar Act was to be enforced caused more alarm at Boston than the taking of Fort William Henry had, three years earlier. There was a doubt as to the legality of the existing writs, and the death of the old king put an end to whatever virtue there was in them. The collectors applied for new writs, and the merchants determined to oppose their being granted.”—Channing, “History of the United States” Vol. III, pp. 2-3.

The Virginia Constitution was the first of the state constitutions with a bill of rights. It appeared in 1776 and the tenth section was as follows:



SEC. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons, not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

This provision obviously merely makes the issuance of general warrants illegal. It is narrower in its terms than the fourteenth article of the Massachusetts constitution which reads as follows:

"XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to his right, if the cause or foundation of them be not previously supported by oath or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

In the Virginia Convention of 1788, in which Patrick Henry led the opposition to the ratification of the Federal constitution, he objected to it because there was no bill of rights and said that without one, "Excise men may come in multitudes . . . go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink and wear." (Beveridge "Marshall," Vol. I, 440).

The fourth Federal amendment is substantially like that in Massachusetts though shorter; it reads:

"ART. IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Now when we consider that these amendments grew out of the movement to *protect* the business of "smuggling" the ingredients of New England rum, it is not surprising that history should repeat itself to-day under the eighteenth amendment. The Volstead Act to-day is regarded by great numbers of Americans in much the same light as the British trade restrictions and the Stamp Act in the eighteenth century, and "rum running" to-day is regarded as a reasonably legitimate performance just as the "molasses running", with rum as its ultimate objective, was regarded then. It is not a question whether it ought to be so—it may be unfortunate—but it certainly is so and it is a perfectly natural and inevitable incident of such legislation as the Volstead Act. The constitutional protest of the American people against being governed *too much* whether by a king or by legislatures or temporary majorities, contained in the fourth amendment since 1791, raises quite as serious a problem of constitutional interpretation for the courts as does the eighteenth amendment.

F. W. G.

## AN EXTRAORDINARY REVENUE RULING

*Editor Massachusetts Law Quarterly:—*

I enclose copy of a letter to White & Case of New York from the Deputy Commissioner of Internal Revenue as follows:—

[COPY.]

TREASURY DEPARTMENT  
WASHINGTON

OFFICE OF  
COMMISSIONER OF INTERNAL REVENUE  
(Letter Head.)

JUNE 9, 1922.

WHITE & CASE,  
14 Wall Street,  
New York, New York.

SIRS: Receipt is acknowledged of your letter of June 1, 1922, requesting a ruling as to the Department's construction of the following provision of Section 250 (d) of the Revenue of 1921:

“and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income excess profits, or war-profits tax Acts . . . shall be assessed within five years after the return was filed . . . ; and no suit or proceedings for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under Section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act.”

In reply you are advised that it is held by this office that the above provision of law refers only to judicial proceedings for the collection of such taxes and not to the summary proceedings by means of distraint authorized by Sections 3187 to 3209,

inclusive, of the Revised Statutes of the United States. Accordingly, if a tax is assessed by the Commissioner within the five year period of limitation provided in the statute, it may be collected by means of distraint after the expiration of such period, although the Government's right of action in court would then be barred by the statute.

Respectfully,

E. H. BATSON,  
*Deputy Commissioner.*

#### COMMENTS ON THE RULING

This letter states in substance that the Commissioner's office takes the position that the provision contained in Section 250 (d) of the Revenue Act of 1921, that no suit or proceeding for the collection of any income or excess-profits taxes under any of the Revenue Acts shall be begun after the expiration of five years after the date when the return is filed, operates to bar judicial proceedings only, and does not prevent the collection of taxes by the summary process of distraint.

This seems to me an extraordinarily narrow construction of the word "proceeding" and a construction that is absolutely unjustified.

The purpose of the statute unquestionably was to limit the time within which a taxpayer could be harassed by efforts of the Bureau of Internal Revenue to collect taxes, whether by suit or otherwise.

Prior to the Revenue Act of 1918, there was no limit to the time within which the Government could sue to collect taxes. The 1918 law contained a provision that no suit or proceeding for the collection of a tax should be begun after the expiration of five years after the date when the return was due or was made.

The Department, however, construed this provision to apply only to taxes due under the 1918 law. The 1921 law contains substantially the same provision, but expressly makes it applicable to all the Revenue Acts beginning with the 1909 Act.

If Congress intended merely to prohibit the bringing of actions at law, it presumably would have employed appropriate language. For example, it did so in Revised Statutes,

Section 5950, which provided that no suit or proceeding for the recovery of an overpayment of the tax shall be maintained in any court unless brought within two years. The words "in any court" make it perfectly clear that Congress had in contemplation judicial proceedings. On the other hand, Congress in the Revised Statutes, many years ago carefully established the procedure to be followed when taxes are to be collected by distraint. Revised Statutes, Section 3190—is entitled "Proceedings on Distraint". Revised Statutes—Section 3197, is entitled "Proceedings for seizure and sale of real estate for Taxes", and the various steps in these proceedings are prescribed minutely. For example, in the case of seizure and sale of real estate, there must be

1. Written notice to the owner stating what property is to be sold, and when and where the sale is to take place, and a provision that the date of sale must be not less than 20 nor more than 40 days from the date of the notice.
2. The notice is to be published in a newspaper.
3. The notice is to be posted in the nearest post-office and in two other public places.
4. The sale is to be at public auction to the highest bidder.
5. The sale is to be held within five miles of the location of the property.
6. If the amount bid be not then and there paid, the officer shall forthwith proceed to again sell the estate in the same manner.

Congress has in these sections not only prescribed the various steps to be followed in the collection of the taxes by a seizure and sale of property, but has itself labelled those steps as "proceedings", and it seems reasonable to conclude that when Congress prohibited any suit or proceeding for the collection of taxes, after five years, it meant to prohibit those acts which it has itself labelled "proceedings".

Federal Courts have repeatedly referred to the acts of the Collector under a writ of distraint as "proceedings". For example, *Sheridan v. Allen*, 153 Federal 568 (at page 570) was a case where the Collector's demand for payment of an

Internal Revenue assessment was refused and he thereupon issued a distraint warrant and levied it upon personal property supposed to belong to the taxpayer. The Court said:

“The proceedings of a collector for the collection of a tax, such as were taken in this case, are distinguishable from a forfeiture and condemnation of property”, etc.

And again:

“Naturally the purchaser gets no more than the Collector is authorized to seize and sell, and we know of no rule, statutory or judicial, that in such cases bars a third person who was not a party to or concluded by the *proceedings*, and who claims to own the property, from asserting his claim against the purchaser in any forum having cognizance of ordinary controversies between individuals.”

If we assume that the purpose of this statute of limitations was to set at rest controversies between the Bureau of Internal Revenue and the taxpayer, the statute fails to attain its object if it be confined in its application to actions at law, because it prohibits only the lesser of two evils. In actions at law brought against the taxpayer, the latter has, when taken to Court, the opportunity to take advantage of any claim which he may have. In the case of proceedings by distraint, however, the taxpayer is helpless. And furthermore, if his property can be seized and sold for taxes at a date more than five years after his return was filed, he cannot even bring a suit to recover the tax thus forcibly exacted from him because Section 252 of the Revenue Act of 1921 provides that no refund shall be allowed or made within five years from the date when the return was due, unless before the expiration of each five years a claim therefor was filed by the taxpayer. A taxpayer aggrieved by the collection of a tax by distraint after five years from the filing of his return would thus be barred from recovering unless he had filed a claim for refund before his grievance arose.

Judge Thompson of the District Court of Delaware in the case of *DuPont v. Graham, Collector*, granted an injunction restraining the Collector from proceeding by distraint on the ground that if the plaintiff's property were seized and sold

for the payment of the tax, he would be without redress, since under the provisions of Section 252 of the Revenue Act of 1921, no remedy at law would be left to him in the event that the amount collected by distraint represented an excessive or unlawful tax. The Court reached this conclusion notwithstanding the provision of Section 3224 of Revised Statutes

It hardly seems conceivable that any court will sustain the Department's construction on this statute of limitations.

Yours very truly,

G. W. MATHEWS.

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN REGARD TO "TRANSFERS IN CONTEMPLATION OF DEATH" MADE PRIOR TO THE ACT OF 1916 AND A STUDY OF PARTS OF THE GOVERNMENT BRIEF AS APPLIED TO TRANSFERS MADE SINCE THE ACT OF 1916.

In four recent cases, the Supreme Court of the United States in unanimous opinions delivered by Mr. Justice McKenna has reversed the decision of the Circuit Court of Appeals for the Sixth Circuit in *Schwab v. Doyle* and has decided that the provision in the revenue act of 1916 relative to the inclusion of transfers "made in contemplation of death" or to take effect in possession or enjoyment "at or after death" in the gross estate of a decedent cannot be construed to apply to transfers made prior to the act of 1916. These cases: *Schwab v. Doyle*, *Union Trust Company v. San Francisco, et al.* v. *Wardell*, *Levi et al. v. Wardell*, and *Knox Executor v. McElligot*, were decided on May 1, 1922. In order to show the reasoning and exact extent of these opinions, the following passages are quoted from the opinion in *Schwab v. Doyle* which controls the other cases mentioned.

EXTRACT FROM THE OPINION

"The plaintiff urges all of the contentions presented in his requests made to the District Court for instructions to the jury, but *so diverse and extensive consideration is only necessary if the Act of Congress be of retrospective operation. To that proposition we shall, therefore, address our attention.*

The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent 455; *Eidman v. Martinez*, 184 U. S. 578; *White v. United States*, 191 U. S. 545; *Gould v. Gould*, 245 U. S. 151; Story, Const. Sec. 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto*



laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated.

The Act of September 8, 1916, is within the condemnation.

There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in *United States v. Heth*, 3 Cranch 398, 413; also *United States v. Burr*, 159 U. S. 78, 82-83. If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive operation must be selected.

The circumstances of this case impel to such selection. If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said, 'Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say twenty-five years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision.' In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelpt by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax, that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax."

"The construction of the Government is more tenable though more unrestrained. It accepted in bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends to the statute to 'transfers of any kind made in contemplation of death *at any time whatsoever* (italics ours) prior to September 8, 1916.' The sole test in the opinion of that officer is 'the

date of the death of the decedent.' He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the Act to relieve from its exactions to the demands of revenue.

"If Congress however, had the purpose assigned by the Commissioner it should have declared it; when it had that purpose it did declare it. In the Revenue Act of 1918 it re-enacted Section 202 of the Act of September 8, 1916, and provided that the transfer of trust should be taxed whether 'made or created before or after the passage of' the Act. And we cannot accept the explanation that this was an elucidation of the Act of 1916, and not an addition to it, as averred by defendant, but regard the Act of 1918 rather as a declaration of a new purpose; not the explanation of an old one. But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure and whatever doubts exist must be resolved against it.

"This we have seen is the declaration of the cases and this the basis of our decision, that is, has determined our judgment against the retroactive operation of the statute. There are adverse considerations and the Government has urged them all. To enter into a detail of them or of the cases cited to sustain them and of those cited to oppose them, either directly or in tendency, and the examples of the States for and against them, would extend this opinion to repellent length. We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the Act of Congress, and have resolved that it should be not construed to apply to transactions completed when the Act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative, and this can not be said of the words of the Act of September 8, 1916.'

EXTRACT FROM BRIEF OF THE SOLICITOR  
GENERAL

“(3) *The tax laid is an excise and not a direct tax.*

Upon this subject in *New York Trust Company v. Eisner*, 256 U. S. 349, the court said :

After the elaborate discussion [in *Knowlton v. Moore*] . . . we think it unnecessary to dwell upon matters that in principle were disposed of there. The same may be said of the argument that the tax is direct and therefore is void for want of apportionment. It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; ‘has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.’ (178 U. S. 81-83.) Upon this point a page of history is worth a volume of logic.

But the distinction is sought to be made that there the court was considering the statute as prospective, while here the contention is that the tax is laid upon the transfer, and that to tax a past action or event is not the taxing of a privilege because it has already been exercised, but is a direct tax upon the estate from which it is to be paid.

Plaintiffs in the several cases are very insistent that the tax must be attached to the technical transfer of the property, which is supposed to take place at a particular moment of time. It is important therefore to consider the exact nature of this tax.

After a very exhaustive and learned review of tax legislation of this character this court in *Knowlton v. Moore*, 178 U. S. 41, 47, 57, said :

Taxes of this general character are universally deemed to relate not to property *eo nomine* but to its passage by

will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.

And again upon the same subject :

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of those words be accurately understood.

That act laid taxes only upon property passing by will or inheritance. But that the court is not greatly concerned about a technical definition of the tax appears from the following language in *Cahen v. Brewster*, 203 U. S. 550 :

For definitions of an inheritance tax plaintiffs in error adduce *United States v. Perkins*, 163 U. S. 625; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Knowlton v. Moore*, 178 U. S. 41. The tax was defined in the *Perkins* case to be 'not a tax upon the property itself, but upon its transmission by will or descent'; and in the *Magoun* case, 'not one on property but one on the succession.' In *Knowlton v. Moore* it was said that such taxes 'rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living, on which such taxes are more immediately rested.' But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or

intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition.

Therefore it is not necessary to hunt out any particular moment when it may be said the tax attaches. What is really taxed is the passing of the property *because of the death of its owner, whether his death follows, is coincident with or precedes the consummation of its passing.* And the death of the owner must always be kept in mind, *because the tax cannot attach until the happening of that event.* If the owner die intestate the title to the real estate passes instantly to the heirs; but not so the personality. It will most likely be converted into cash and distributed in that form. The same may be said when the estate passes by will. When a transfer is made, or trust created, to take effect in possession or enjoyment at or after the death of the donor, the passing of the property extends from the execution of the transfer or trust to the taking of possession by the transferee. While the right to the property may become irrevocably vested when the instrument creating the trust or the remainder estate is delivered, yet that which makes property really valuable, its possession and use, has not passed. The word 'transfer' as used in the statute certainly includes the passing of both the title and the possession. A transfer made or trust created in contemplation of death may pass both the title and the possession at once, or one or both may hang in suspense for an indefinite length of time. In fact that is the precise condition in the present case. Both the legal title and the possession of the estate are in the Trust Company; *and there will not be a complete devolution of the title till the trust shall be terminated.* When the title and possession both pass upon the delivery of the instrument still the *occasion* for the tax is not complete, and will not be until the death of the donor. Both the transfer *and the death* are prerequisites of the tax. Hence in a sense under such circumstances the tax is always retroactive, in that when called into being by the death of the donor it reaches back to the transfer. But it is the *occasion* composed of the two elements, the transfer *in contemplation of death* and the death, that are taxable."

## DISCUSSION OF THE OPINIONS AND OF THE POSITION OF THE GOVERNMENT

The opinions of *Schwab v. Doyle* deal only with the "retrospective operation" of the act of 1916. It expressly avoids "so diverse and extensive consideration" as that involved in the prospective operation of the provisions about "contemplation of death, etc.," in the 1916 and later acts.

Coming now to the quoted extract from the Solicitor General's brief, we find the latest view of the government as to the nature of this part of the estate tax and of the grounds, if any, of its constitutionality as to gifts made since the 1916 or later acts.

The first comment to be made is that the quotation from the opinion of Justice Holmes in *New York Trust Co. v. Eisner* has no application to "contemplation of death". The court in that case was dealing with the estate tax as a whole and not with the details of the definitions of "gross" and "net" estate.

The Solicitor General then quotes, as established, the proposition in *Knowlton v. Moore* that "The public contribution which death duties exact is predicated on the passing of property *as the result of death*," and the further sentence, "The qualification of such taxes as privilege taxes or describing them as levied on a privilege may also produce misconception, unless the import of these words be accurately understood."

The next quotation is from *Cahen v. Brewster* that "Death is the generating source from which the particular taxing power takes its being," but that "These definitions were intended only to distinguish the tax from one on property and it was not intended to be decided that the tax must attach at the instant of the death . . . We did not prescribe the time of its imposition." In *Cahen v. Brewster*, however, the question was whether the Louisiana succession tax could apply to legacies or shares in the estate of a person who died before the passage of the act but which had not been distributed when the act was passed. It was held that the application of the tax to such shares was constitutional, but the Solicitor General's quotation from Mr. Justice McKenna's opinion in

*Cahen v. Brewster*, 203 U. S. at 550, stops short of its point and is, therefore, misleading. The opinion continued,

“It (the state) may select the moment of death, or it may exercise its power *during any of the time it holds the property from the legatee*. ‘It is not,’ we said in the Perkins case, ‘until it has yielded its contribution to the state that it becomes the property of the legatee’.” (See also *Carpenter et al v. P. 17 How?* 456.)

Now it seems obvious that “the time it (the state) holds the property does not begin *until the death*, the “generating source from which the taxing power takes its being” and “as the result” of which the property passes.

The Solicitor General then advances the extraordinary proposition that the transfer of personalty under trust will not be complete until the termination of the trust. Unless the trust is revocable, it is difficult to see how the transfer is incomplete for neither the grantor nor his representatives after his death have the slightest right to or interest in it after the delivery of the trust instrument unless that instrument so provides.

In another part of the brief, reference is made to the English taxing acts and the English practice is, doubtless, the strongest point in the government case; but the short answer to it is that there are no constitutional limitations on the parliamentary powers. Decisions in various states containing dogmatic sentences not thoroughly reasoned are quoted also in the brief as to the nature of the tax, but it is noticeable that no mention is made of the *Hodges case* (215 N. Y., 447) decided in New York in 1915 in which Chief Judge Willard Bartlett held that gifts “in contemplation of death” could not be added to legacies to the same person to increase the rate of taxation *because one was “a gift inter vivos taxable when made”* and the other a legacy *taxable only upon the death of the testator*”.

While I submit that these various state decisions sustaining this form of taxation are superficially reasoned and erroneous, the opinion in the *Hodges case* is, at least, frank—stating the nature of the tax as one on a transaction *inter vivos* “taxable

when made," but not usually collected until after death, when they become known.

The subject of this form of tax has been repeatedly discussed in this and other periodicals during the past few years. (See IV. Mass. Law Quart. 165, V Mass. Law Quart. 107-109, VI Mass. Law Quart. May, 1921, 116, American Bar Assoc. Journal Nov. 1920, 156, American Bar Assoc. Journal Feb. 1921, 93, American Bar Assoc. Journal May, 1921, 257). In order to keep the matter before the minds of the bar in such a way as to provoke discussion on aspects of the question which do not appear to have been discussed or considered by the courts, I repeat the following passages from one of the previous discussions above referred to.

The following question has been suggested,—is not the federal statute an abuse of the taxing power attempted through a sneaking definition by which the estate of a decedent is made to include for taxation purposes property which obviously is not part of the estate as the rights in it are not in any way affected by the *fact* of death and therefore, no one, whether executor, administrator, beneficiary, or creditor of the estate, could possibly reach it as part of the estate? It is also suggested that the theory of the government in attempting this legislative definition is, first, the creation of an artificial principle that it is the duty of an individual to preserve intact the money value of his property at any particular time until his death without reducing it by gifts to persons or purposes who do not happen to be charitable corporations, although he may lose it or squander it as he pleases. Having first created this somewhat extraordinary principle or duty, in order that the government may tax the value of this estate at the death, the government then assumes that individuals try to avoid this tax if they can and, therefore, as an administrative measure, in order to prevent the invasion of this so-called duty thus created, it must create a statutory presumption that gifts within a certain period are *prima facie* made for the purpose of avoiding the alleged duty. Accordingly, the government resorts to the use of the phrase "in contemplation of death" for the purpose of ascertaining both the gross and the net estate for federal taxation purposes.

Of course this phrase "in contemplation of death" has a persuasive appearance. It would not look so well if the legis-



lature has attempted to state frankly, in the manner above stated, the alleged principle or duty upon which it sought to impose this tax. . . .

It is submitted that the only constitutional interpretation of the words "in contemplation of death" which can be applied under this statute is one which limits it to gifts *causa mortis* or gifts having some strong connection to them which connects the fact of death with the completion of the transfer as a matter of *intent* of the parties to the transaction, as distinguished from any *motive* on the part of the donor the nature and existence of which may, or may not, be entirely unknown to the donee.

It is submitted that a mere motive, such as the motive of a generous parent, relative, or friend, that the donee of a gift should have the fullest enjoyment of property given while they are both alive and free from any deduction from taxation, of the modern exorbitant and manifold character, is "an immaterial fact" which, to quote the language of the justices in *196 Mass. at page 627*, "does not distinguish" such gifts "in any way that the state can recognize and make the foundation of an excise tax."

Is not the constitutional right of a man to deal with his property freely while he is alive exactly the same when he is 80 years old as when he is 21, 30, or 40 assuming him to be still reasonably sane? Has he not a right to every honest, legitimate and above all, generous motive at any stage of his life? It is submitted that his constitutional right to life, liberty, and the pursuit of happiness include what might be called the right of privacy or, at least, the right of indulging in desires and motives equally with his other fellow citizens without being subjected to a tax unless the intent as distinguished from the motive connected with a particular transaction is one which the law can recognize as affecting the nature of the transaction.

In other words, we have an attempt to impose a tax on a donor or a donee, or on the property of one or the other based on an honest and legitimate motive of a donor, the existence, amount, and time of the collection of the tax being impossible of ascertainment until the death of the donor and being contingent upon the death of the donor, not being payable until after that death. Would it not be difficult to think out any more arbitrary proceeding as an illustration of an immaterial

fact resorted to as a basis of discrimination in taxation? How does such a statute differ from one which placed a tax upon every red-haired donor or donee collectible within a year after the death of the donor and graduated in accordance with the scale set out in the inheritance tax law? When the human facts of this business are analyzed out of all their persuasive verbiage, is not this tax a palpable example of arbitrary extortion in violation of the principles which have been recognized ever since we had a constitution? Are not the generous impulses of living Americans entitled to encouragement and protection from such arbitrary and indirect attacks? Is not the right to give one of the best incidents of the right of property? When the intent to give is clear and effective can it be arbitrarily penalized in certain cases by a tax based on so elusive and so mixed a thing as motive involving an inquisition by the government into private life and feelings which may cause untold distress and suffering? Is such a proceeding an exercise of the taxing power? Does it not appear on the face of the act that this portion of it is, in the language of Chief Justice White in *Knowlton v. Moore*, "an arbitrary and confiscatory excise bearing the guise of a tax"?

There is no privilege or succession connected in any way with the *fact* of death as a "generating source" which is taxed. Is not the tax a direct tax on the donor, or the donee, or the property? How can *motive* be called a taxable privilege? Even if gifts generally could be taxed how can the motive of the gifts as distinguished from the intent to make the gift be made the basis of the tax? It is difficult to see how the fact of death can be a "generating source" of taxing power before the death becomes a fact.

F. W. G.

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*Note.*

For a recent discriminating judgment as to the application of the act to facts, assuming the act as to transfers to be Constitutional, see the opinion of Judge Hazel in the Western District of New York in *Vaughan et al v. Riordan*, 280 Fed. 742.

## THE QUESTIONS OF LAW RAISED BY MR. PELLETIER'S NOMINATION FOR THE POSITION OF DISTRICT ATTORNEY OF SUFFOLK COUNTY

This article has nothing to do with Mr. Pelletier as an individual. It is a purely professional study intended to provoke discussion of the serious questions of law raised by his campaign for re-election. In other words, could he take office if elected and if not, why not? The exact legal situation does not appear to have been fully analyzed as yet, in print, at least.

The legislature by statute passed in 1856 imposed upon the Supreme Judicial Court the difficult and responsible duty of removing district attorneys and various other officers for cause shown if the public good so required.

The substance of that act appears as G. L. Chap. 211, §4 as follows:

"A majority of the justices may, if in their judgment the public good so requires, remove from office a clerk of the courts or of their own court; and if sufficient cause is shown therefor and it appears that the public good so requires, may upon a bill, petition or other process, upon a summary hearing or otherwise, remove a clerk of the Superior Court in Suffolk County, or of a district court, a county commissioner, sheriff, register of probate and insolvency or district attorney."

This statute has been part of the law of Massachusetts for sixty-five years. It has been the duty of the court to act under it fairly and impartially when a case was properly brought before them. A few months ago such a case involving Mr. Pelletier, then district attorney of Suffolk County, was brought before them and after an extended trial before five justices with full opportunity given to Mr. Pelletier to defend himself with the assistance of his distinguished counsel he failed even to take the witness stand in answer to the serious charges brought against him and the court in a unanimous judgment found him guilty of misconduct in

office, and unfit to hold the office and removed him because the law of Massachusetts required them to do so.

The constitutionality of the statute had been attacked in the Tufts case and sustained by the court in a carefully reasoned opinion. It was again attacked in the Pelletier case and the court reconsidered the whole question and again in a carefully reasoned opinion decided that the statute was within the power of the legislature and that, therefore, they were bound to act under it. In this connection appear the following passages in the opinion of Chief Justice Rugg (in 240 Mass.):

“The office of District Attorney is not created nor provided for in the Constitution. It is mentioned only in articles 8 and 19 of the Amendments. These articles recognize that office as existing, but do not secure its tenure nor establish any right superior to the control of the legislature. The office may be regulated, limited, enlarged or abolished by the legislature according to its view of the public interests. The only factor concerning the office secured by the Constitution is that the incumbent shall be elected by the people of the district as established by the General Court. In every other respect it is subject to the legislative power. Opinion of the Justices, 117 Mass. 603. *Dearborn v. Ames*, 8 Gray 1. Opinion of the Justices, 216 Mass. 605.

“Every rational presumption is made in favor of the validity of every statute. . . . This fundamental and established principle is peculiarly applicable to the present statute. This statute has been a law of the Commonwealth for more than sixty-five years, having been first enacted in almost its present words by St. 1856, c. 173, sec. 7. It was amended in particulars not now important implying direct legislative affirmation by St. 1876, c. 209, and St. 1897, c. 224. It has been re-enacted by the General Court in four revisions of the laws, Gen. St. c. 112, sec. 4, Pub. Sts. c. 150, sec. 4, R.L. c. 156, sec. 4, G.L. 211, sec. 4. Pursuant to its authority a district attorney of the Suffolk District was removed from office in 1861, *Com. v. Cooley*, 1 Allen 358, a register of probate and insolvency in 1904 (see record in re. Folson on file

with the Clerk of the Supreme Judicial Court for the Commonwealth) and in 1921 a district attorney of the northern district, *Attorney General v. Tufts*, 239 Mass. 458 (See *Bullock v. Aldrich*, 11 Gray 206). . . .

“The constitutionality of the statute and the jurisdiction of the court to act under it are firmly established.”

After extended and careful findings of fact in regard to the different allegations in the petition, the judgment of the court concluded as follows:

“The facts found with reference to the several charges have been stated at length. All the material evidence and all the circumstances have been taken into account and weighed with care. Every presumption of uprightness, rectitude and innocence, which commonly characterize the conduct of men in public station, has been invoked in favor of the respondent.

“The compelling nature of the evidence has constrained us to make the finding stated. One conclusion alone is possible on the whole evidence. The facts carry their own mandate. It is plain. It cannot be escaped. It is imperative. The findings make clear beyond doubt that the respondent is unfit to hold longer the office of district attorney.

“The General Court in the lawful exercise of the power conferred upon it by the Constitution has imposed upon us the duty to remove a district attorney, ‘if sufficient cause is shown therefor and it appears that the public good so requires.’ G.L. Chap. 211, sec. 4.

“Official corruption is sufficient cause for the removal of a district attorney. When private favoritism and personal aggrandisement are placed above principles of obvious justice and considerations of the general welfare by a district attorney, the public good requires that he be removed.

“No discussion is needed to demonstrate that, under the findings of fact set forth at length, no other course is open except to perform the duty of removal imposed on us by the statute. Therefore the following order is made:

“Now, on this 21st day of February in the year of our Lord one thousand nine hundred and twenty-two, by and before a majority of the justices of the Supreme Judicial Court, namely, Arthur P. Rugg, chief justice, and Henry K. Braley, Charles A. DeCourcy, James B. Carroll, and Charles F. Jenney, associate justices, upon the information brought by the attorney general of the Commonwealth against Joseph C. Pelletier, after hearing all the relevant evidence offered on behalf of those interested herein and listening to arguments, and after due deliberation and consideration, and all and singular the premises being seen and understood and it being made to appear to said court that certain of the allegations of said information are proved to be true as set forth in the judgment filed and that sufficient cause is shown for the removal of said Joseph C. Pelletier from the office of district attorney for the Suffolk district and that the public good requires such removal; therefore it is considered by said court, all of said justices concurring and they being a majority of the justices of said court, that the said Joseph C. Pelletier do not in any manner concern himself further about holding of or exercising the said office of district attorney for the Suffolk district; but that he be and is hereby removed therefrom, and forejudged and excluded from holding or exercising the said office.”

This order follows exactly the precedent established by the terms of the order by which a district attorney was removed by the full court for insanity in 1861. (See *Commonwealth v. Cooley*, 1 Allen 358).

This judgment of the court created the vacancy in the office. General Laws, chapter 54, section 142, provides:

“Upon a vacancy by removal or otherwise . . . , he [the Governor] shall . . . cause precepts to be issued for an election to fill such vacancy at the next biennial state election for which precepts can be seasonably issued, unless the term of the office expires on the first Wednesday of January following such state election.

“Upon a vacancy in the office of district attorney,

register of probate and insolvency and sheriff, the governor with the advice and consent of the council may appoint some person thereto *until a district attorney, register of probate and insolvency or sheriff is qualified.*  
 . . .”

The last sentence above quoted is somewhat more abbreviated than the sentence in the Revised Laws and in the statutes of 1907 and 1913 which preceded it, as in those statutes the sentence reads “until a district attorney . . . is elected and qualified”.

The statute providing for the office of district attorney is General Laws, chapter 12, section 12, as follows:

“There shall be a district attorney for each district set forth in the following sections, who shall be a resident therein and shall be elected as provided by section 154 of chapter 54. He shall serve for four years *beginning with the first Wednesday of January after his election and until his successor is qualified.*”

Chapter 54, section 154, thus referred to, reads as follows:

“At the biennial state election in 1922, and in every fourth year thereafter, a district attorney shall be chosen by the voters in each of the districts into which the Commonwealth is divided for the administration of the criminal law.”

These appear to be all the statutes governing this matter and their clearly expressed meaning appears to be as follows:

If the term of office expires in January after the state election next following the occurrence of the vacancy, no special precept need be issued by the governor, the election taking place as a matter of course under the law for the term beginning on the first Wednesday of the following January. The term of office of a person so elected obviously will not begin until January. It differs in this respect from the term of office of a person who is elected under a special precept to fill a vacancy in the middle of a term. The person so elected to fill a vacancy obviously, under the statutory language above

quoted, may take office and qualify immediately after the election. The coming election, however, is not a special election to fill a vacancy and, therefore, it is governed by the express language of the statute which states that the term of such an officer elected at a regular election shall begin on the "first Wednesday of January after his election."

These statutes also specify the term for which Mr. O'Brien was appointed when the removal of Mr. Pelletier created a vacancy in the office. As stated in the statute, Mr. O'Brien was appointed by the governor with the advice and consent of the council "until a district attorney . . . is qualified." Accordingly, unless Mr. O'Brien should resign, he will continue to be district attorney under his present appointment and it will be his duty to act as such under the law until a successor is not only elected, but legally "qualified". Obviously, as specified in the statute, election is not enough. If a man who was elected turned out not to be a "resident" of the district, he could not qualify. The same would be true if he were not "an inhabitant of this Commonwealth" under Article IX. of the Bill of Rights or if he were or became insane either before or after the election.

In 1911, the governor requested the opinion of the attorney-general, at that time, Hon. James M. Swift, as to whether a new election for clerk of courts in the County of Dukes County was necessary under peculiar circumstances, which appear in the following opinion by the attorney-general. (3 Op. A. G.)

"It appears that the name of Samuel Keniston was upon the official ballot as a candidate for such office and that the highest number of votes was cast for him. It further appears that said Keniston died on the morning of election day before the opening of the polls. It does not appear to what extent the fact of the death of said Keniston was known to the voters of the county, but it is not claimed . . . that such fact was generally known.

"Upon these facts I am of opinion that said Nevin [who received the next highest vote] was not elected clerk of the courts for said county, but that there was a failure to elect. This view is supported by authority. *Howes v. Perry*, 92 Ky. 260; *State v. Walsh*, 7 Mo. App. 142;



*State v. Speidel*, 62 Ohio St. 156. It is an application of the principle that where the person receiving the highest number of votes is ineligible there is a failure to elect, and the person receiving the next highest number is not elected. This rule seems to be common to England and America. In England, however, and in one or more States of the United States it seems that this rule does not apply where the voters at the time of the election have notice of the ineligibility. The weight of authority in America seems to be, however, that the fact of notice is immaterial. *Bowker et al.*, Petitioners; Loring and Russell, Election Cases, 282, and note; Cooley, Const. Lim. (7th ed.) 931, 932; Dillon, Municipal Corporations (5th ed.), sec. 373, and note. I am aware of no authority which, in the absence of evidence that the fact of the death of said Keniston was generally known to the voters of Dukes County at the time of the election, would hold said Nevin to have been elected clerk of the courts. According to the weight of authority in this country he would not have been elected even if it appeared that the fact of the death of said Keniston was generally known.

“Since there has been a failure to choose a clerk of the courts, St. 1907, c. 560, sec. 306, becomes applicable. This section provides that the Governor shall cause a precept to be issued for the election of such officer.”

Now let us assume that Mr. Pelletier receives the highest vote at the election. 1. Is he eligible? 2. If not, will Mr. O'Brien be elected? 3. If Mr. Pelletier is eligible so that there is an election can he qualify when the term begins on the first Wednesday in January? 4. If not, must a precept be issued by the governor for a special election forthwith or for a special election at the next state election in 1924?

#### 1st IS MR. PELLETIER ELIGIBLE?

The first obstacle which he will meet seems to be the judgment of removal, the effect of which does not appear to have been discussed in the press. What is the nature and effect of that judgment? It is a final judgment rendered in “an inquest into the respondent's official rectitude and general quali-

fications to hold an office of great power and responsibility" (*Atty. Gen. v. Tufts*, 239 Mass. 491). The petition for the inquest was filed by the attorney general as the chief law officer of the Commonwealth, but neither he nor the Commonwealth nor any one else appear to be parties to the proceeding in a strict sense. There was only one party, apparently—the respondent in an inquest of this character. The attorney general conducted the proceedings on behalf of the people of the whole Commonwealth but strictly he acted as a "friend of the court" to assist in an orderly proceeding. The court itself in such an inquest represents all the people of the Commonwealth by the express direction of the legislature in the statute imposing the duty upon the court of holding the "inquest". It is necessarily authorized and required to find facts as a cause of removal and establish them by a legal judgment. In this respect the removal proceeding resembles very closely a disbarment proceeding.

The judgment establishes the fact that the respondent is unfit to hold the office and expressly orders him "*not in any manner*" to "*concern himself further about holding of or exercising the said office of district attorney . . . but that he be and is hereby removed therefrom, and forejudged and excluded from holding or exercising the said office.*" These are sweeping terms which are not limited in time or confined to any particular term of office. They resemble a judgment "*in rem*". How would the terms of this judgment be effected by an election? The judgment expressly related to his general qualifications for the office and legally established his unfitness and the fact that the "public good" of the whole Commonwealth requires that he should not hold that office.

Mr. Throop, in his book on "Public Officers", says:

"Sec. 71. The common law declares that unfitness, if gross and palpable, is a disqualification for holding an office. Thus it has been said: 'If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or of the king's revenue, or the common wealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and

hath no skill and science to exercise or execute the same, the grant is merely void, and the party disable by law, and incapable to take the same, *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people.' [This passage is from Bacon's Abridgment Vol. III Lit. "Offices and Officers" I 6th ed. pp. 735-6]. It is needless to say that the practical application of this doctrine is generally very difficult, and, as far as our examination has extended, there is but one case in the United States, where it has been applied. That case arose in the court of common pleas for the city and county of New York. A person, who was ignorant of any foreign language, had been appointed interpreter for one of the district courts of New York city, and brought an action against the city to recover his salary. It was held that he could not recover. The court said: 'In a case of a person duly appointed to an office or public employment the rule undoubtedly is that the fitness of the appointment cannot be questioned, if he satisfies the appointing authority, in an action for the compensation attached to the office or employment, if such person performs or is ready to perform the duties required of him in his position. But the present is the case of one alleged to be wholly incompetent. There is no attempt to prove that the plaintiff is unsuited or unfit for the position he held, except in the sense of being at all times unable to perform his duties. By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of a fraud, either upon the officer who appointed him, and upon the public from whom he was to receive compensation, or upon the latter alone.' "

The case referred to was *Conroy v. The Mayor etc.*, 6 Daly, 490 (1876). The case arose on appeal from a judgment for the plaintiff which was directed below. The opinion, by Joseph F. Daly J., after the passage already quoted above by Mr. Throop, continued as follows:

"There would be no doubt if the appointee were disqualified by law from holding the office, being an alien,

or not a citizen of this state, or a minor . . . or under a disqualifying sentence on conviction of crime, this might be set up against his recovery of salary or compensation in his action. To hold otherwise would be to countenance and favor a violation of law. In the same manner, to hold the plaintiff entitled to the compensation attached to the position or employment of interpreter, when he is absolutely disqualified as an interpreter, would be to favor a fraud upon the people, the duties of the plaintiff being personal and he being incapable at all times of performing them." Charles P. Daly, C. J. and Van Hoesen, J. concurred.

This judgment was affirmed without opinion by the Court of Appeals consisting of Justices William F. Allen, Charles J. Folger, Charles A. Rapallo, Charles Andrews, Theodore Miller, and Robert Earl with Chief Judge Sanford E. Church dissenting, in 67 N. Y. 610.

The court in the preliminary opinion in the Pelletier case said:

"There is nothing in the statute which violates in any degree the provisions of Art. 9 of the Declaration of Rights as to freedom of elections and the right to be elected for public employment. Neither that article, nor any other provision of the Constitution assures to an officer, whose continuance in office has been judicially determined in accordance with a general statute to be contrary to the public welfare, the right still to remain in office." (See *Atty. Gen. v. Pelletier*, 240 Mass. 295).

Now while it is obvious that an officer might be removed for a cause which would not affect his eligibility at a later election for another term of the same office yet when the judgment especially establishes a man's general unfitness for the office in the light of "the public good" of the Commonwealth does not the common law rule mentioned by Mr. Throop come into play so that, as long as that judgment remains unmodified, he is as ineligible as the interpreter in the New York case who was unfit because he was incapable of interpreting. How can an election by a voting majority in one county affect

the unfitness for the office established by a judgment rendered in the interest of the whole Commonwealth?

It may be said that the statute merely gives the court authority to "remove" and that this fact automatically limits the scope of the judgment to the term of office during which the removal takes place. But is this so? The statute says "office" and does not mention "term". Is not the statute such that a judgment of general unfitness in the light of the "public good" becomes an adjudicated fact between the people of the Commonwealth and the individual aspirant for office until that judgment is modified? The judgment "excludes" him from the "office". The term of the office does not appear to be a part of the office. While no exhaustive examination of the law on this point has been made, Mr. Frank J. Goodnow, an authority on administrative law, in his article on "Officers" in "Cyc" appears to discriminate carefully between an "office" and the "term of office". It would certainly seem a strange interpretation of our law if a man judicially determined to be unfit to remain in office for the reasons established by this judgment were eligible to re-election within a few months. In order to obtain a modification of the judgment, it would seem to be necessary for Mr. Pelletier to apply to the court and show affirmatively that something had occurred since to warrant a modification; but the only change which seems to have occurred is his disbarment and that merely adds to his unfitness, for it makes it impossible for him to appear in court and perform the functions of a district attorney, so that he is still more in the position of the New York interpreter who was incapable of interpreting.

Reference already has been made to the ninth article of the Massachusetts Bill of rights and the passage quoted from the opinion in the Pelletier case that nothing in the statute or in the proceedings under the statute violates the ninth article. Not only is this clearly the case, but a closer study of the other provisions in the Bill of Rights seems clearly to support the view expressed that the judgment of the court establishing unfitness is a permanent barrier to holding this particular office in future, whether by election or appointment, until modified.

The ninth article above mentioned reads as follows:

"IX. All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."

The eighth article, immediately preceding it, reads as follows:

"VIII. In order to prevent those who are vested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments."

The Preamble contains the following sentence:

"It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them."

Article VII. contains the following sentence:

"Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men."

Article XVIII. reads as follows:

"XVIII. A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth."

All these provisions of the Bill of Rights are of equal force and importance and must be read together. Do they not recognize and contemplate fitness as an underlying qualification for public office under such reasonable laws and regulations as may be established?

Under these provisions read together, is not the judgment of the court legally binding in accordance with its express terms and directly in accordance with the jurisdiction intended to be conferred upon it by the legislature? Is not the question transferred from one of constitutional law to one of the law of judgments? Upon the general principles of the law relating to judgments, is not the fact of unfitness of the respondent for this particular office *res judicata* as between the people of the Commonwealth and the individual involved in the judgment? The voting majority in the single county involved cannot affect the rights of the people of the Commonwealth as a whole which included both the voting majority and the voting minority as well as all the men, women and children who did not vote in the particular county. Mr. Pelletier may run for any other office that he pleases, but for this office he has been judicially determined to be unfit and is he not therefore disqualified in accordance with the constitution and the laws of Massachusetts and after a full and fair trial?

Certainly, when the various articles of the Bill of Rights above quoted are read together, they emphasize the statement of Chief Justice Rugg already quoted that neither Article IX

“nor any other provision of the constitution assures to an officer whose continuance in office has been judicially determined in accordance with a general statute to be contrary to the public welfare, the right still to remain in office.”

These provisions of the constitution seem to justify the addition to this clear and convincing statement of the words,

“or to regain that office either by election or appointment until the judicial determination referred to has been modified for cause shown.”

There may be an answer to this reasoning. What is it?

## 2. IF HE IS NOT ELIGIBLE, WOULD THERE BE AN ELECTION?

Under the ruling of Attorney General Swift above quoted, it is an open question, apparently, if the fact of ineligibility is generally known. It seems pretty clear that the *facts* constituting ineligibility are already known and if that is the test then there would be an election. Mr. Pelletier's appearance on the ballot would be a nullity and the man receiving the next highest vote would be elected. If, as Mr. Swift suggested, general knowledge of the facts would not affect the question, then there would be no election and a precept would have to issue for another election.

## 3. IF MR. PELLETIER IS ELIGIBLE AND ELECTED, COULD HE QUALIFY ON THE FIRST WEDNESDAY OF JANUARY?

He would still have the judgment to face for the reasons stated. But there are, of course, other questions of law in the background which have already been mentioned in the press. The first is under the act of 1922 requiring district attorneys to be members of the bar. A referendum petition has been filed on this act and it will appear on the ballot at the state election for the approval or disapproval of the voters. Art. XLVIII. of the amendments to the constitution defines the "Referendum" and explains its effect as follows:

"*Legislative power* shall continue to be vested in the General Court; but the people reserve to themselves . . . the popular referendum which is the power of a specified number of voters to submit laws, *enacted* by the General Court, to the people for their ratification or rejection.

Sec. 3. *Mode of Petitioning for the Suspension of a Law and a Referendum Thereon.* A Petition asking for a referendum on a law, and requesting that the operation of such law be suspended, shall first be signed by ten qualified voters and shall then be filed with the secretary of the commonwealth not later than thirty days after the law that is the subject of the petition *has become law*. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the



proposed law as such description will appear on the ballot together with the names and residences of the first ten signers. If such petition is completed by filing with the secretary of the commonwealth not later than ninety days after the law which is the subject of the petition has become law the signatures of not less than fifteen thousand qualified voters of the commonwealth, then the operation of such law shall be suspended, and the secretary of the commonwealth shall submit such law to the people at the next state election, if thirty days intervene between the date when such petition is filed with the secretary of the commonwealth and the date for holding such state election; if thirty days do not so intervene, then such law shall be submitted to the people at the next following state election, unless in the meantime it shall have been repealed; and if it shall be approved by a majority of the qualified voters voting thereon, such law shall, subject to the provisions of the constitution, take effect in thirty days after such election, or at such time after such election as may be provided in such law; if not so approved such law shall be null and void; but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election."

Assuming that the act is approved, it will "take effect" thirty days after the election and will therefore be in effect when the term of office would begin in January, 1923. As Mr. Pelletier has been disbarred, he could not meet the requirement of the act. It would not be an *ex post facto* law as to him because in the express words of the constitution it "became a law" when it was passed by the legislature and signed by the governor. The effect of the referendum petition merely suspended its operation until after the people had a chance to vote on it. It would seem a strange interpretation of our machinery of government to say that the voters of a single county with full notice of the pendency of a law "enacted" by the legislature which, if "ratified" will be in effect before the term of office begins, could confer up-

on a candidate a right to the office against the whole people of the Commonwealth.

The second question which has also been referred to in the press is as to the nature of the statute which is the subject of the referendum—is it a new rule or is it merely a statute declaratory of existing law? If it is declaratory, the referendum will be unnecessary as a vote either way would not alter the existing law. This question was suggested in the recent advisory opinion of the Justices of the Supreme Judicial Court as follows:

“There is a considerable body of authority which holds that the use of the word ‘attorney’ in the title of the office carries with it the meaning that the incumbent must be a member of the bar. It has been said that ‘To be a district attorney, he must be a lawyer. He is not an attorney in fact. He must be an attorney at law. The name of the office implies it. He is the attorney of the state in a certain district, to distinguish him from an attorney general.’ *State v. Russell*, 83 Wis. 330, 332-3 *People v. May* 3 Mich. 598, *Engel v. Cass*, 28 N. Dak. 219. *Danforth v. Egan*, 23 So. Dak. 43. . . .

“Since the power to prescribe the qualification specified in the proposed bill is vested in the General Court, such a qualification, if prescribed by law, would stand on the same footing as other provisions of the law regulating elections. The voters would not be at liberty under the law to disregard it. Officers charged with the preparation of ballots and the conduct and the declaration of results of elections would be obliged to conform to it. *Miner v. Olin*, 159 Mass. 487. *Cole v. Tucker*, 164 Mass. 486. *The same result would follow if the word ‘District-attorneys’ as used in the Constitution imports membership in the bar of the Commonwealth.* . . .

Unless some convincing answer is found to these various questions, it may be that Mr. Pelletier’s whole campaign for re-election, his nomination, the appearance of his name on the ballot and any votes which he may receive constitute an entirely illegal proceeding which the law of Massachusetts says must be disregarded. It would seem to be the

legal duty of Mr. O'Brien to hold his office and on behalf of all the people of the commonwealth, whose representative he is, to resist all proceedings by Mr. Pelletier to get the office until the issue is determined. Mr. Pelletier is, of course, entitled to whatever rights he may have under the circumstances, but it is difficult to see by what process of legal reasoning they can be demonstrated.

4. IF HE COULD NOT QUALIFY WOULD A SPECIAL PRECEPT  
ISSUE FOR A SPECIAL ELECTION FORTHWITH OR AT THE  
NEXT STATE IN 1924?

The answer to this question would seem to depend on whether there is an election. If Mr. Pelletier does not receive the highest vote, of course, no question arises. If he does receive the highest vote then, if general knowledge of the facts creating ineligibility is material, there might be an election and the man receiving the second highest vote would be elected. If general knowledge of the facts is immaterial and if there is an election and then a vacancy created by the failure or inability to qualify, the precept would be for a special election at the state election in 1924. If the disqualification or ineligibility is such that there is no election, a precept would issue forthwith for a new election. Possibly the governor may find it necessary to ask for an advisory opinion of the justices as to his proper course in the matter in the event of Mr. Pelletier's receiving the highest vote.

F. W. GRINNELL.

## THE LAW OF EMINENT DOMAIN AND THE ACT TO TAKE SARGENT'S PICTURE FROM THE BOSTON PUBLIC LIBRARY

Chapter 541 of the Acts of 1922 provides as follows:—

AN ACT PROVIDING FOR THE TAKING, FOR EDUCATIONAL PURPOSES, OF THE PICTURE ENTITLED "THE SYNAGOGUE."

*Be it enacted, etc., as follows:*

SECTION 1. The department of education of the commonwealth is hereby authorized and directed within six months of the effective date of this act to take by right of eminent domain for educational purposes in teaching art or the history of art under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws, but not in, or in connection with, any public library, the picture entitled "The Synagogue", now in the Boston public library, and all rights therein, of whatever nature or description. At the time of the taking, the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking.

Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition to the superior court for Suffolk county within six months from the taking for the assessment of all such damages.

All damages incurred under this act shall be paid from the general funds of the commonwealth upon due presentation.

The provisions of chapter seventy-nine of the General Laws, so far as applicable and save as herein otherwise expressly provided, shall apply to any action under this act.

SECTION 2. The department of education is authorized to make rules and regulations for the custody of said picture and its use for the educational purposes stated in section one. [Approved June 13, 1922.]

The earlier draft of this act and its history and the facts about the picture to which the act applies appear in the opinion of the Attorney General, reprinted at the end of this discussion. In that opinion he advised that the taking "for educational purposes", as the act then provided, was not for a public use, because the picture was already fully dedicated to educational purposes.

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### THE AMENDMENT AFTER THE OPINION

After the opinion the bill was amended to provide that the taking was "for educational purposes in *teaching art or the history of art but not in or in connection with any public library.*" These new words were regarded as providing for a "different" public use and the bill was then passed in spite of a vigorous protest of Chairman John C. Hull of the Judiciary Committee. When the bill came before His Excellency the Governor a second opinion was submitted to him by the Attorney General to the effect that,

"the bill now provides . . . for educational purposes different from those to which it is now put and thereby avoids a constitutional defect . . . The promotion of popular education is a public purpose. *Knights v. Treasurer and Receiver General* 237 Mass. 493, 496. In view of the amendment . . . and of the presumption of constitutionality which attends enactment by the legislature, *I cannot advise you that the bill does not appropriate the picture for a public purpose.*"

With all due respect for the opinion of the legislature and the cautious conclusion of the Attorney General, I submit that Mr. Hull's opposition was sound, that the bill is demonstrably void on its face, and that the picture cannot be taken under it.

The picture is now dedicated not only to "educational purposes in teaching art or the history of art", as fully as it possibly can be, but also to public decorative purposes, because it may now be seen and studied by every one in its place as part of the decorative plan of a great artist. It may be studied as part of the mural decoration of a public building

not only by teachers and their students, but by those who study alone and by the public generally who wish to see it in its place. These present public purposes are much broader than those specified in the act, and the question is, not only whether the power of eminent domain can be used "to work a change of control" or "a transfer of property from one party to another", as in *Carey Library v. Bliss*, but whether an obvious limitation, or restriction, of an existing public use may be used by the legislature as a basis for a taking.

In his first opinion the Attorney General speaks of "the exhibition purposes" to which the picture is now devoted. But the purposes are broader than that. As he says in another place "the picture is in effect a part of the Public Library". It is part of the mural decoration. Can the legislature dismantle or take to pieces a public library "for more limited educational purposes by eminent domain"?

The only question which I wish to discuss in order to provoke discussion is broader than any one's views about this picture, broader than the question of the fate of the picture itself—namely, what would this act, if sustained by the courts, lead to in the law of eminent domain?

Some years ago when MacMonnies' statue of the "Bacchante" was about to be placed in the Boston Public Library, some estimable citizens raised a "moral" disturbance and the statue went to the Metropolitan Museum in New York. Fortunately for Boston, a replica was subsequently procured which is now in the Museum of Fine Arts. Now, suppose that we should some day be blessed with a fanatical attempt to purify our sight and that, as, in the case of the witchcraft delusion in 1692 or the "Know-Nothing" movement in 1853, the fever should spread through the community; suppose that, instead of religious fanatics, we should have a legislature of prudes who attempted to take the "Bacchante" and other statues and perhaps a number of pictures by distinguished artists "for educational purposes in the teaching of art or the history of art but not in or in connection with a public museum"—could they do it? Could they take them all and put them in a state normal school to be studied by "art students only"? Or suppose that they attempted a literary crusade and took all the books in the library containing anything which the ruling prudes might think likely to demoralize

us, including, perhaps, parts of Shakespeare (and much modern fiction and *vers libre* which we could *well spare*).

The taking of property dedicated to one public use like a school house for a "different" public use like a railroad or a reservoir, furnishes no argument in support of such takings as in this act relative to Sargent's painting. Is this bill on its face anything but an attempt to censor a particular work of art under the guise of eminent domain, *not as a work of art* but for some other reason not specifically expressed in the act, but which was freely expressed in the press while the bill was under discussion:—namely, that it shocks some people as an unfair and unfounded suggestion as to the history of the Jewish religion?

I hold no brief for Sargent's picture, nor do I wish to be understood as criticising the feelings of those who do not like it. I simply say that they are over-anxious about the influence of the picture so far as their race and religion are concerned. People who paint pictures or write books or publish newspapers are not always fair. Indeed, some one has doubted whether absolute fairness is a moral possibility. But if we are to take anything that shocks anybody by eminent domain for more limited "educational" or other purposes than those to which they are now dedicated, we might as well go back to the days when Roger Williams and Anne Hutchinson were driven out of Massachusetts to settle more tolerant Rhode Island. There has been a good deal of criticism from many quarters of the treatment of deported aliens and others who said unpleasant things, but, if "free sight" of works of art is to be suppressed by the power of eminent domain, why not free speech and the freedom of the press? Why not take any newspaper in Boston and suppress it? It is true that the motives of the legislature cannot be inquired into, but the substantial purpose of the taking can and must be studied and analyzed closely on the face of the act and in the light of the facts to which the act is to be applied.

I submit that the act "impairs a contract" because it is not a taking for a "public use". It is a mere "change of control" and "transfer of property from one person to another" *with a restriction on its present public use*. It destroys a part of the Boston Public Library not for "the purpose of teaching art or the history of art" in spite of the declaration of that

purpose, for the picture may be better studied for that purpose where it is now but for the sole purpose clearly expressed of taking it out of the Public Library. Taking a thing for the sole purpose of taking it and excluding it from public libraries is not a public purpose. It seems to be confiscation. Why not?

F. W. GRINNELL.

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*Note.*

As the first opinion of the Attorney General on the earlier draft of the act contains the facts and an interesting and convincing exposition of the law so far as it goes, it is reprinted here.





# HOUSE . . . . No. 1698

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Printed as a House document, on motion of Mr. Hull of Leominster and with the approval of the committee on Rules. May 16.

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## **The Commonwealth of Massachusetts.**

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DEPARTMENT OF THE ATTORNEY GENERAL,  
BOSTON, May 5, 1922.

*Joint Committee on the Judiciary, State House.*

GENTLEMEN:— You submit for my consideration a bill entitled “An Act to take the picture ‘The Synagogue’ for educational purposes,” which provides:

“SECTION 1. The department of education of the commonwealth is hereby authorized and directed within thirty days of the passage of this act to take by right of eminent domain for educational purposes the picture entitled ‘The Synagogue’ now in the Boston public library. At the time of the taking, the department shall file a statement of the taking with the city clerk of the city of Boston, and shall award all damages sustained by any person by reason of such taking.

Any person entitled to an award of damages under this act, or the commonwealth, whether or not an award has been made, may petition for the assessment of all such damages to the superior court Suffolk county within sixty days from the taking.

All damages incurred under this act shall be paid by the treasurer of the commonwealth upon due presentation.

The provisions of chapter seventy-nine of the General Laws, save as herein expressly provided shall apply to this act so far as they are applicable.

SECTION 2. The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.

SECTION 3. This act shall take effect upon its passage.”

With the bill have been submitted: (1) a contract, dated January 18, 1893, between the Trustees of the Boston Public Library and John S. Sargent, an artist of recognized reputation, by which Mr. Sargent agreed, for the sum of fifteen thousand dollars, to paint certain pictures for the "Special Library Hall of the new Public Library building in Copley Square in Boston"; (2) contract between said Sargent and the trustees of a fund subscribed by citizens, dated December 5, 1895, whereby said Sargent agreed to paint certain additional pictures for lunettes in said hall and the said trustees agreed to pay said fifteen thousand dollars for the original paintings and the extra panels. It further appears that over eighty persons subscribed to this fund over sixteen thousand dollars; that "The Synagogue" was painted pursuant to said contracts and installed in said hall in said Library in 1919; that a movement for the removal of said picture was undertaken; and that the Corporation Counsel of Boston, on April 12, 1920, advised the trustees of the Library that the facts disclosed a public charitable trust which precluded them from removing the said picture. *Eliot v. Trinity Church*, 232 Mass. 517.

At this legislative session a petition (No. 723) was filed, praying "for legislation relative to the removal of the picture 'The Synagogue' from the Boston Public Library, or for such further legislation as may be necessary for the taking of the picture by the right of eminent domain." This petition was accompanied by a bill (House 1131), which directed the Trustees of the Boston Public Library to remove said picture from the library. Upon suggestion that this bill impaired the obligation of the contract with the subscribers, the present bill was substituted.

You ask whether the proposed bill would be constitutional. Your inquiry raises two questions: First, whether the contracts with Mr. Sargent and with the subscribers prevent taking said picture by eminent domain either with or without taking said contracts; second, whether the "taking" is for a public purpose.

1. The power to take private property for public use is incident to and inseparable from sovereignty. *Kohl v.*

United States, 91 U. S. 367, 371. It extends to all property within the jurisdiction of the Commonwealth, including personal property (*Offield v. New York, N. H. & H. R.R. Co.*, 203 U. S. 372) and contracts, *West River B. Co. v. Dix*, 6 How. 507; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Cincinnati v. Louisville & Nashville R.R.*, 223 U. S. 390, 400; *Meade v. United States*, 2 Ct. Cl. 224; *Brimmer v. Boston*, 102 Mass. 19. It cannot be diminished or bargained away by statute. *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20. Nor can private parties remove property from the scope of the power of eminent domain by making contracts concerning it. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685; *Chicago, etc., R.R. Co. v. Nebraska*, 170 U. S. 57, 74; *McGrath v. Boston*, 103 Mass. 369. The fact that the taking renders impossible further performance of a contract touching the property taken does not "impair" the obligation of such contract within the meaning of art. I, § 10 of the Federal Constitution. *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685. I am, therefore, of opinion that the contracts with Mr. Sargent and with the subscribers are not a bar to taking said picture for a public purpose.

2. The authority of the Commonwealth could not be preserved if it lacked power to take the instruments needed by it to execute public ends. But the social necessity upon which the power rests imposes limits upon its exercise. Article X of the Bill of Rights provides, in part:

"... And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The property must be "appropriated to public uses" and "reasonable compensation" must be paid. While neither individual obstinacy nor individual greed can defeat an appropriation to public uses, both the citizen whose property is taken and the taxpayer who pays for the taking have a right under both the State and the Federal Constitution to require that private property shall not be appropriated to private uses by eminent domain. Riverbank Improvement

Co. v. Chadwick, 228 Mass. 242; Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 503. In Salisbury Land & Improvement Co. v. Commonwealth, 215 Mass. 371, 377, the court said:

“Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible.”

The question whether a statute appropriates property by eminent domain to a public use or to a private use is a judicial one upon which the constitutionality of the act depends.

The picture is now held upon a charitable trust of indefinite duration. *Eliot v. Trinity Church*, 232 Mass. 517. It is one of a series which is daily exhibited free to the public in a building dedicated to public education, which is centrally located in the capital and largest city of the Commonwealth. As the picture is in effect a part of the Public Library of the City of Boston, it is, in my opinion, dedicated to educational purposes to the same extent as that library. See *Cary Library v. Bliss*, 151 Mass. 264.

The proposed bill directs the Department of Education to take the picture for “educational purposes.” Section 2 provides as follows:

“The department of education is authorized to make rules and regulations for the custody of the picture and its use for educational purposes under section seven of chapter sixty-nine or under chapter seventy-three of the General Laws or for any other educational purpose.”

G. L., c. 69, § 7, provides:

“The department may co-operate with existing institutions of learning in the establishment and conduct of university extension and correspondence courses; may supervise the administration of all such courses supported in whole or in part by the commonwealth;

and also, where deemed advisable, may establish and conduct such courses for the benefit of residents of the commonwealth. It may, in accordance with rules and regulations established by it, grant to students satisfactorily completing such courses suitable certificates."

G. L., c. 73, § 1, provides:

"The department of education, in this chapter called the department, shall have general management of the state normal schools at Barnstable, Bridgewater, Fitchburg, Framingham, Lowell, North Adams, Salem, Westfield and Worcester, and the normal art school at Boston, wherever said schools may be hereafter located, and of any other state normal schools hereafter established, and of boarding houses connected therewith, and may direct the expenditure of money appropriated for their maintenance."

While the act appropriates the picture to educational purposes generally, the manner in which it shall be used to accomplish those purposes is left to be determined by the Department of Education. The picture is already appropriated to educational purposes by the trust under which it is now held. Under the proposed bill the Department of Education might determine that the picture should remain where it now is and be exhibited in the same manner as heretofore. If so, the bill works simply a change of control. To such a situation *Cary Library v. Bliss*, 151 Mass. 364, seems applicable. In that case, in holding that a public library held upon a public charitable trust of indefinite duration by trustees provided by the donor could not be taken by eminent domain and transferred to a corporation created to manage it for like purposes, the court said:

"The question arises, whether taking property from one party, who holds it for a public use, by another, to hold it in the same manner for precisely the same public use, can be authorized under the Constitution. Can such a taking be founded on a public necessity? It is unlike taking for a public use property which is already devoted to a different public use. There may be a necessity for that. In the first case, the property is already appropriated to a public use as completely in every particular as it is to be. Can the taking be found to be for the purpose which must exist to give it validity? In every case it is a judicial question whether the taking is of such a nature that it is or may be founded on a public necessity. If it is of that nature, it is for

the Legislature to say whether in a particular case the necessity exists. We are of opinion that the proceeding authorized by the statute was in its nature merely a transfer of property from one party to another, and not an appropriation of property to public use, not a taking which was, or which could be found by the Legislature to be, a matter of public necessity. *West River Bridge v. Dix*, 6 How. 507. *Lake Shore & Michigan Southern Railway v. Chicago & Western Indiana Railroad*, 97 Ill. 506. *Chicago & Northwestern Railway v. Chicago & Evanston Railroad*, 112 Ill. 589."

The suggestion that the Department of Education might make a different or more effective use of the picture for educational purposes than the use to which it is at present devoted cannot, in my opinion, save the bill. It is not enough that under the authority of a statute the property may be appropriated either to public or to private uses. An act which appropriates private property either to a use which is public or to a use which is private is unconstitutional. *Salisbury Land & Improvement Co. v. Commonwealth*, 215 Mass. 371. Similarly, an act which permits the Department of Education to devote the picture either to the same use to which it is now devoted or to a different use would not be constitutional.

The committee is entitled to take into consideration all the facts relating to the pending bill in determining whether or not, in the particular case now before it, the necessity exists for taking the picture. If the result which is to be achieved by the proposed legislation is in reality to secure the removal of the picture from the place where it is now devoted to a public use, a taking to achieve such a result would not be authorized. See also Mass. Const. Amend. XI and XLVI. If the result is to take the picture from public trustees who hold it for a public use, to be held by a public official for what is in effect the same public use, such taking would not be within the power of the Legislature. In order to enable the Commonwealth to take the picture by eminent domain the committee must be satisfied that the result to be achieved by the taking is not to accomplish the removal of the picture to prevent it from being put to the public use to which it is now devoted, but that when taken

by the Department of Education it is not only to be devoted to a public use which is in reality different from the exhibition purposes to which it is now devoted, but also to such a use that the resultant benefit to the public will justify the expenditure of the taxpayers' money as a matter of public necessity. Otherwise, under the rule laid down in *Cary Library v. Bliss*, *supra*, the result would not be one to achieve which the power of eminent domain could constitutionally be employed or public money spent.

Yours very truly,

J. WESTON ALLEN,

*Attorney General.*



















